SUPREME COURT, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

THEODORE LYONS,

Petitioner,

v.

CLARICE STOVALL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS BEEN DENIED HIS RIGHT TO DUE PROCESS WHERE THE COURT OF APPEALS REFUSED TO ADDRESS TWO SUBSTANTIAL, CONSTITUTIONAL ISSUES PRESENTED IN HIS APPEAL, ONE OF WHICH HAD CAUSED THE DISTRICT COURT TO GRANT HIS PETITION FOR WRIT OF HABEAS CORPUS?

II. WHETHER THIS COURT'S *TEAGUE* DOCTRINE SHOULD BE APPLIED *SUA SPONTE* WHERE THE STATE HAS WAIVED A *TEAGUE* DEFENSE AND NO FACTORS MAKE SUCH *SUA SPONTE* ACTION APPROPRIATE?

III. WHETHER THE DISTRICT COURT CAN PROPERLY BE DEEMED TO HAVE ANNOUNCED A NEW RULE OF CRIMINAL PROCEDURE WHEN IT APPLIED BEDROCK PRINCIPLES WHICH HAD BEEN ANNOUNCED BY THIS COURT BEFORE PETITIONER'S UNDERLYING CONVICTION BECAME FINAL?

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Theodore Lyons, through his attorneys, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 188 F.3d 327. The decision of the district court (App., *infra*, 53a-90a) is unreported.

STATEMENT OF JURISDICTION

The Sixth Circuit delivered its decision on August 24, 1999. Petitioners' petition for rehearing was denied on November 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

U.S. Const. amend. IV

The Due Process Clause of the Fifth Amended to the Constitution of the United States provides that no person shall be "deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner Theodore Lyons is in the custody of the Michigan Department of Corrections following his conviction in Detroit Recorder's Court of first degree criminal sexual conduct in violation of MCL 750.520(b)(1)(h)(ii). After exhausting several claims in the Michigan state courts, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan.

On July 30, 1997, United States District Court Judge Barbara Hackett ordered that the writ of habeas corpus be granted on two separate and independent grounds. On appeal, two judges of the Sixth Circuit voted to reverse the District Court's judgment – but failed to rule upon two critical issues relating to the case.

B. BACKGROUND FACTS

In 1983, Petitioner worked as an assistant at a community living facility in Belleville, Michigan, utilized for housing mentally retarded clients of the Michigan Department of Mental Health. The state subsequently alleged that

Petitioner raped a woman, Evangeline McKenzie, residing at the facility.

Ms. McKenzie had entered the home on June 22, 1983. A December 1983 medical examination revealed that she was pregnant, and she subsequently gave birth to a baby boy. Proceeding on the assumption that the act resulting in the pregnancy had occurred while Ms. McKenzie was at the facility, investigators utilized blood testing and polygraph examinations in an attempt to exclude male staff members they believed could have had contact with her. The investigators ultimately claimed that they had excluded all staff members but Petitioner.

In July 1984, the investigators obtained a search warrant seeking to compel Petitioner to provide a blood sample. Human leukocyte antigen ("HLA") tests of the sample revealed that Petitioner's blood contained genetic markers similar to markers found in the baby's blood. Petitioner was then charged with first degree criminal sexual conduct.

The case proceeded to trial in August 1987. Over defense objections, the State relied almost exclusively on two experts who testified that the HLA tests revealed a 99% probability that Petitioner had fathered the child. The defense questioned the reliability of the HLA tests and their statistical probability conclusions and presented testimony seeking to establish that Petitioner did not have sexual contact with Ms. McKenzie. However, the Prosecutor repeatedly argued that the statistical conclusions could be equated to a 99% chance that Petitioner was guilty.

Petitioner testified in his own behalf and faced the following cross-examination:

Q Well, since you told the jury you couldn't possibly have done it, you must have been outraged that they would even think about you as a suspect in the case?

A Yes, I was upset considering I had been reassured repeatedly by the detective in charge that I wasn't a suspect.

Q But then they did the blood test, right?

A Yes, they did.

Q Okay. You're an innocent man, right?

A I'm innocent of this charge, yes.

Q That's all we're talking about. We're not talking about other things you may have done, just this particular crime we have charged against you.

A I'm not guilty of the charge. I had nothing to do with it.

Q I understand your defense perfectly, sir, **but if you're the innocent man that you claim to be, why did the police have to get a search warrant and Court order to get your blood**?

App. 77a-78a (emphasis added).

Petitioner was convicted and the court sentenced him to a term of ten to twenty five years in custody. He appealed his conviction to the Michigan Court of Appeals. Initially,

the court dismissed the appeal for lack of jurisdiction and denied a motion for rehearing. The Michigan Supreme Court reversed and remanded the case for consideration as an "appeal of right." *People v. Lyons*, 439 Mich. 887 (1991). Several years later, on April 13, 1994, the Michigan Court of Appeals affirmed Petitioner's conviction in an unpublished decision. *See People v. Lyons*, No. 147006. Petitioner then filed an application for leave to appeal in the Michigan Supreme Court. That application was denied by an Order dated January 31, 1995.

C. HABEAS CORPUS REVIEW

On July 28, 1995, Petitioner filed a Petition for Writ of Habeas Corpus raising two issues that had been exhausted in the Michigan courts. First, Petitioner contended that the State's probability testimony (and related arguments) violated the presumption of innocence and rendered his trial fundamentally unfair. Second, Petitioner claimed that the prosecutor's cross-examination violated his constitutional rights in several respects.

After an exhaustive and well-reasoned analysis, Magistrate Judge Marc Goldman concluded that the petition should be granted on both claims. As to the first claim, the Magistrate Judge found that the State's probability evidence -- which began with an assumption of a 50% probability of paternity -- eviscerated the presumption of innocence guaranteed by the Sixth Amendment to the United States Constitution. *See* App. 63a-77a. The Magistrate Judge explained:

> [I]n this case, neither of the two experts' testimony nor the court's instructions gave the jury any guidelines for evaluating this evidence. Rather the only guideline given was

> the prosecutor's closing argument, in which he mischaracterized the meaning of the evidence and the weight that should have been afforded the evidence by arguing that the 99.7% probability of paternity as computed by the experts met his burden of establishing guilty beyond a reasonable doubt. The admission of this evidence in its unexplained form and its subsequent use by the state exemplified all that is wrong with the use of statistical evidence in a legal proceeding. It oversimplifies complex computations, exaggerates their impact, and results in an erroneous quantification of the state's burden to prove guilt beyond a reasonable doubt.

App. 76a-77a.

As to the second claim, Magistrate Judge Goldman found that the prosecutor's cross-examination violated Petitioner's Fourth Amendment rights. *See* App. 77a-82a.

> The prosecutor attempted to use petitioner's unwillingness to consent to giving a blood sample without a warrant as evidence of his guilt. By doing so, the prosecutor impermissibly infringed upon petitioner's exercise of his fourth amendment rights.

App. 82a.

The Magistrate Judge also concluded that each error, when viewed separately, had a substantial and injurious effect on the jury's verdict. *See* App. 82a-89. Analyzing Petitioner's first claim he explained:

> Although errors in the admission of evidence are not ordinarily a proper basis for granting habeas relief, if the admission of the evidence rendered the trial so fundamentally unfair as to violate due process, habeas relief may be granted. . . . Here, the introduction of the statistical evidence which was predicated upon the assumption that there was a fifty percent chance that petitioner had intercourse with the victim meets that standard. As noted, the introduction and use of this evidence undermined the presumption of innocence and relieved the prosecutor of its burden to prove each element of the crime beyond a reasonable doubt. In view of the absence of any other evidence to prove that petitioner had intercourse with the victim, there is no question that the error had a substantial and injuries effect in determining the jury's verdict.

App. 86a-87a.

In assessing Petitioner's second claim, the court acknowledged that the prejudice issue presented a closer question. Nevertheless, the Magistrate Judge concluded the several factors – including the fact that the examination occurred during a critical stage of the trial and his conclusion that the State's case was "not strong" – compelled a finding that the prosecutor's improper examination was prejudicial. *See* App. 87a-89a.

District Court Judge Barbara Hackett adopted the Magistrate Judge's Report *in toto*. The court accepted the Report as its findings and conclusions and ordered: "Theodore Lyons' petition for writ of habeas corpus hereby

is GRANTED for the reasons well-developed in the magistrate judge's report and recommendation." App.54a. The district court entered its Order on July 30, 1997, and specifically directed that Petitioner's case was to be returned to the state court for trial within 180 days. *See id.*

D. THE COURT OF APPEALS

Respondent filed a notice of appeal, but failed to obtain a stay of the district court's judgment or the order requiring retrial within 180 days. Therefore, on February 12, 1998, Petitioner filed a motion to dismiss Respondent's appeal as moot. The Sixth Circuit clerk noted that the matter would be assigned for consideration by the merits panel hearing the case.

In drafting its widely divergent opinions, the panel's judges focused almost exclusively upon this Court's decision in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and whether the *Teague* defense should be raised *sua sponte* to bar relief notwithstanding Respondent's failure to raise *Teague* in the district court. *See Lyons v. Stovall*, 188 F.3d 327 (6th Cir. 1999).

Writing for the majority, Judge Clay contended that Petitioner had failed to exhaust his first claim for relief, *see* 188 F.3d at 331-35, but he declined to find that Petitioner's claim was defaulted. *See* 188 F.3d at 334.[1] Rather, after

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[1] Judge Gilman joined in Judge Clay's suggestion that Petitioner did not exhaust his first claim for relief. *See* 188 F.3d at 328 n.1 and 344. It is important to emphasize that the State did not raise the exhaustion defense at any point during the proceedings, and Judge Clay reached this conclusion based on his own investigative efforts; the panel never notified the parties that it was considering an exhaustion question. Apparently, Judge

concluding that the State properly perserved the *Teague* defense by raising it in its appellate pleadings, Judge Clay concluded that habeas relief was unwarranted because Petitioner was seeking application of a new rule of criminal procedure in violation of *Teague*. *See* 188 F.3d at 339-42.

Judge Gilman filed a "concurring" opinion, where he concluded that the State had waived the *Teague* defense. *See* 188 F.3d at 344-46 (Gilman, J., concurring). Nevertheless, he agreed that the court was obliged to raise the defense *sua sponte* and that *Teague* would bar relief in this case. *See* 188 F.3d at 347.

Judge Moore rejected the majority's presumption that the *Teague* defense should be applied *sua sponte* in most habeas corpus cases. *See* 188 F.3d at 347-50 (Moore, J., dissenting). In her view, the federal courts ought not raise the nonretroactivity doctrine unless there are factors particular to the case that would make *sua sponte* action appropriate. Judge Moore ultimately concluded that no such factors exist in this case. *See* 188 F.3d at 349-50.

The panel failed to issue any decision regarding two important legal matters. No judge addressed Petitioner's motion to dismiss the State's appeal, and Judges Clay and

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Clay's conclusion was based upon his reading of one brief filed in the Michigan Court of Appeals, but Petitioner *had* specifically informed the Michigan Court of Appeals that he was raising the constitutional claim, and he had cited legal precedents to support this position. Moreover, Judge Clay failed to acknowledge that Petitioner did present his first legal claim to the Michigan Supreme Court. A careful review of **all** pleadings filed in the state courts amply demonstrates that Petitioner fairly presented his first legal claim to the state courts. The Michigan courts had an opportunity to consider this legal claim.

Gilman seemed to overlook the fact that the Petitioner had also been granted relief on his second claim for relief.

Petitioner asked the Sixth Circuit to reconsider its judgment and to issue a ruling on these two unresolved matters. The court refused and offered the following explanation:

> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

App. 91a-92a.

ARGUMENT

A. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY AND REMAND THIS CASE FOR FURTHER CONSIDERATION IN LIGHT OF THE PANEL'S REFUSAL TO ENTER ANY DECISION REGARDING TWO IMPORTANT FEDERAL QUESTIONS.

A habeas petitioner, like other litigants, is entitled to due process in the appellate courts. A Court of Appeals has wide latitude in its decision of whether or how to write an opinion, especially with regard to summary affirmances. *See*

Taylor v. McKeithen, 407 U.S. 191, 194 n.4, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972).[2]

Yet, it is not appropriate for a court summarily to *reverse* a district court's decision - particularly a decision granting a writ of habeas corpus - without addressing important federal questions *necessary to its decision*. For some unknown reason, the *Lyons* panel refused to address two critical matters: (1) Petitioner's motion to dismiss and (2) Petitioner's second claim for habeas relief -- a claim on which he had been successful below. While the majority subsequently noted that it had "fully considered" all issues, Petitioner has no way of discerning the basis for any ruling on these matters or presenting it to this Court for an informed review.

In *Taylor*, a legislative reapportionment case, the District Court adopted the recommendation of a special master. The Court of Appeals had reversed without opinion and adopted a counterplan presented by Louisiana's Attorney General. On petition for certiorari, this Court expressed concern that the Court of Appeals summarily reversed without opinion on a point considered at length by the District Court. Because the record did not fully inform this Court, it vacated the judgment and remanded the case to the Court of Appeals for further proceedings. *See Taylor*, 407 U.S. at 194. Accord *Northcross v. Memphis Board of Education*, 412 U.S. 427, 428-29, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (remanding for further proceedings where it was impossible to determine whether the Court of Appeals applied the proper standard); *California v. Krivda*, 409 U.S. 33, 35, 93 S.Ct.

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[2] *See also* Fed. R. App. P. 36. The Sixth Circuit recognizes that summary dispositions may be appropriate where all members of the panel are in accord. *See* Rule 19, Court of Appeals for the Sixth Circuit.

32, 34 L.Ed.2d 45 (1972) (remanding for further proceedings where the Court was unable to determine the basis for the California Supreme Court's decision).

As to two critical federal questions, the panel in this case has offered nothing to support its decision. The majority's assurance that it "considered" Petitioner's claims is of little moment; Petitioner is entitled to a dispositive ruling on the merits regarding these claims so that he can appreciate the nature of the court's decision and, if appropriate, present informed argument to this Court in support of reversal.

For all of these reasons, this Court should exercise its supervisory jurisdiction to ensure that Petitioner receives due process of law in this habeas proceeding, remanding this case for further proceedings on the merits.

B. THIS COURT SHOULD RESOLVE THE IMPORTANT QUESTION AS TO WHETHER, AND WHEN, FEDERAL COURTS SHOULD *SUA SPONTE* APPLY THE *TEAGUE* DEFENSE.

The purpose of defenses to habeas corpus relief

> is to accord appropriate respect to the sovereignty of the States in our federal system. . . . But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state [interest], a federal court implies no disrespect for the State by entertaining the claim.

Ulster County Court v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). Although a majority of the *Lyons* Court concluded that Respondent had waived the *Teague* defense by failing to raise the issue at any time during

the district court proceedings, a different majority held that the *Teague* defense must be applied *sua sponte* in this case.

In so ruling, the panel asserted that this Court has authorized *sua sponte* application of the *Teague* defense. This is a questionable premise. Before 1991, this Court denied habeas relief on nonretroactivity grounds notwithstanding the state's failure to raise the defense in a timely fashion in two cases (and in *Teague* itself). *See Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). It has never done so since *Teague* was decided. Rather, the Court has consistently held that the burden of asserting nonretroactivity belongs to the state and not the federal courts *sua sponte*. *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 118 S.Ct. 1895, 1899 n.3, 141 L.Ed.2d 76 (1998) (declining to apply *Teague* because the state raised the defense for the first in its petition for certiorari); *Caspari v. Bohlen*, 510, U.S. 383, 392, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) ("We have recognized that the nonretroactivity doctrine 'is not "jurisdictional" in the sense that [federal courts]. . . must raise and decided the issue *sua sponte*."); *Godinez v. Moran*, 509 U.S. 389, 397, n.8, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1990) (refusing to apply the *Teague* defense *sua sponte*).

Following this Court's lead, federal courts have usually applied waiver principles in an even-handed manner. Most courts of appeals have refused to apply the *Teague* defense where the state had failed to raise it in the district court. *See, e.g., Ayala v. Speckard*, 102 F.3d 649, 651 & n.2 (2d Cir. 1996), *cert. denied*, 520 U.S. 1236, 117 S.Ct. 1838, 132 L.Ed.2d 1042 (1997); *Frey v. Fulcomer*, 132 F.3d 916, 920 n.4 (3rd Cir. 1997), *cert. denied*, 507 U.S. 984, 118 S.Ct. 2076, 122 L.Ed.2d 746 (1998); *Epperly v. Booker*, 997 F.2d 1, 9 n.7 (4th Cir. 1993), *cert. denied*, 570 U.S. 1015, 114 S.Ct. 611, 126 L.Ed.2d 575 (1994); *Blackmon v. Johnson*,

145 F.3d 205, 209 n.13 (5th Cir. 1998), *cert. denied*, --- U.S. ---, 119 S.Ct. 1258, 143 L.Ed.2d 355 (1999); *Sinistaj v. Burt*, 66 F.3d 804, 805-06 n.1 (6th Cir. 1995); *Hanrahan v. Thieret*, 933 F.2d 1328, 1337 n.19 (7th Cir.), *cert. denied*, 502 U.S. 970, 112 S.Ct. 446, 116 L.Ed.2d 464 (1991); *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir.), *cert. denied*, 506 U.S. 1523, 113 S.Ct. 297, 121 L.Ed.2d 221 (1992); *Hatch v. Oklahoma*, 58 F.3d 1447, 1453 (10th Cir. 1995), *cert. denied*, 517 U.S. 1235, 116 S.Ct. 1881, 135 L.Ed.2d 176 (1996).

A few courts have held that the *Teague* defense may be raised *sua sponte* in cases where the state had not perserved it. *See, e.g., Curtis v. Duval*, 124 F.3d 1, 5 (1st Cir. 1997); *Fisher v. Texas*, 169 F.3d 295, 305 (5th Cir. 1999); *Winsett v. Washington*, 130 F.3d 269, 274 (7th Cir. 1997).[3] However, unlike the *Lyons* majority, these courts note that such power should be used judiciously. *See Winsett*, 130 F.3d at 274; *Curtis*, 124 F.3d at 5.

The decision in this case stands in stark contrast to the great weight of authority, for the Sixth Circuit has now announced a presumption that *Teague* should be applied *sua sponte* in most federal habeas cases. It is of particular concern that the majority seems to hold that *sua sponte* application of *Teague* is appropriate in light of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 188 F.3d at 344 n.12 (Clay, J.) and 347 (Gilman, J., concurring) (*discussing* 28 U.S.C. § 2254(d)). This logic is skewed, because Petitioner's case was filed well *before* the enactment of the AEDPA, and this Court has ruled that the AEDPA should not be applied in a retroactive fashion. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

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[3] *See also Jones v. Page*, 76 F.3d 831, 850 (7th Cir.), *cert. denied*, 519 U.S. 951, 117 S.Ct. 363, 136 L.Ed. 2d 254 (1996).

Petitioner should not be penalized on account of this new enactment.[4]

The panel majority seems to announce a new (and unprecedented) rule that the *Teague* defense *must* be applied even if the state has forfeited it. However, the concerns of federalism and comity are marginal in a state-waiver situation "because the state brought the problem on itself." *Boardman*, 957 F.2d at 1537. The *Teague* defense should rarely be applied in such circumstances and it should not have been applied in this case.

C. THE *TEAGUE* DEFENSE DOES NOT BAR RELIEF UNDER ANY CIRCUMSTANCES.

The Michigan courts erroneously concluded that the probability testimony and argument at Petitioner's trial was proper and did not violate the constitution. Before admitting the evidence, however, the trial judge candidly admitted that its ruling went "against the weight of the authorities from the other Courts in allowing the evidence to be presented." The judge also noted that several courts had "excluded the final percentage because that could be misread or misunderstood by the jury as indicative of the percentage of guilt, rather than regarding paternity." He nevertheless admitted the evidence without limitation.

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[4] This conclusion is particularly unfair given that Petitioner's case has been delayed for years through no fault of his own. Petitioner was convicted in 1987, but the Michigan state courts dud not rule on his appeal until 1994; the Michigan Supreme Court did not decide his application for leave to appeal until 1995; and the petition in this case was filed in July 1995 but was not ruled on by the district court until 1997. But for these delays, Petitioner's case would have been ruled on long before enactment of the AEDPA

This Court has used several formulations when articulating the standard to determine whether a rule is "new" for *Teague* purposes. Consequently, "it is becoming increasingly commonplace to find inter- or intra-circuit conflicts as to whether a particular rule is or is not 'new.'" J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 25.5 at 996 (3d ed. 1998).[5]

Even so, this Court has made clear that *Teague* will not bar relief where a petitioner asks the federal court to apply constitutional principles that were in existence prior to the conclusion of the state court appeal process. *See generally Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1684, 140 L.Ed.2d 828 (1998); *Stringer v. Black*, 503 U.S. 222, 226, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). As noted by the District Court, Petitioner's first claim flowed directly and naturally from the bedrock principles stated in *Herrera v. Collins*, 506 U.S. 390, 398-400 (1993), *Bell v. Wolfish*, 441 U.S. 520, 533 (1979), *Estelle v. Williams*, 425 U.S. 501, 503 (1976), and *In re Winship*, 397 U.S. 358, 364 (1970). *See* App. 65a-67a.

Relying on nothing more than the dissenting opinion of a judge from Wisconsin, Judge Clay contended that Petitioner's first claim was "susceptible to debate" among reasonable jurists. *See Lyons*, 188 F.3d at 341 (*citing State v. [Hartman]*, 426 N.E.2d 320, 329 (Wis. 1988) (Steinmetz, J., dissenting)). But Judge Clay does not identify any court ruling to the effect that the admission of such testimony would not violate the presumption of innocence.

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[5] Another commentator has described the *Teague* framework as a "jurisprudential morass." Weisberg, *A Great Writ While it Lasted*, 81 J. Crim. L. & Criminology 9, 28 (1990)

On the contrary, notwithstanding Judge Steinmetz' protestations in 1988, a review of the legal landscape in *1995* demonstrates a clear wall of authority to the effect that the presumption of innocence is violated when the state relies upon Bayes' Theorem -- the 50% probability of paternity assumption -- to present probability testimony in a criminal trial. *See State v. Boyd*, 331 N.W.2d 480 (Minn. 1983); *State v. Joon Kyu Kim*, 398 N.W.2d 544 (Minn. 1987); *State v. Hartman*, 26 N.W.2d 320 (Wis. 1988); *State v. Spann*, 563 A.2d 1145 (NJ Super AD, 1989); *State v. Skipper*, 228 Conn. 610, 637 A.2d 1101 (1994).[6]

And Petitioner's case is far worse than the aforementioned cases, for the State urged the jury to convict Petitioner based on nothing more than the skewed probability evidence. The state's doctors testified that there was a 99.7 percent chance that Petitioner was guilty as charged, and the prosecutor echoed this refrain and told the jury that this numerical probability could be equated with proof beyond a reasonable doubt.[7] In fact, the prosecutor repeatedly argued that these numerical findings were the same as statistical proof of guilt. Petitioner has located no reported decision where a court permitted a prosecutor to argue that statistical evidence

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[6] It appears that no federal court has addressed a similar claim, presumably because the state courts have consistently concluded that admission of the evidence would be unconstitutional.

[7] Perhaps most egregiously, both doctors compared Mr. Lyons' potential innocence to a game of chance and testified that there was only a very small possibility that he was falsely accused. During one astounding portion of his testimony, Dr. Walker ventured to tell the jury how the "strong" probability evidence should be compared with other evidence in the case. According to the doctor, such evidence might only be overcome if Mr. Lyons could show that he was in Australia at the time of the assault.

(here, a purported 99.7% probability) is the same as proof beyond a reasonable doubt.

The state's evidence was used as a measure of the probability of the defendant's guilt, thereby improperly undermining the presumption of innocence, eroding the values served by the reasonable doubt standard, and dehumanizing our system of justice. The state violated bedrock principles of criminal law when presenting this evidence and argument, and for these reasons, too, the petition should be granted.

CONCLUSION

For all of the reasons stated above, this petition should be granted; alternatively, in the exercise of this Court's supervisory authority, the decision below should be summarily reversed and this case should be remanded to the Sixth Circuit for further proceedings in which the panel is directed to address the issues of mootness of the State's appeal and the prosecutor's improper cross-examination of Petitioner based on Petitioner's exercise of his Fourth Amendment rights.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL- TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed August 24, 1999]

No. 97-1894

Theodore J. Lyons, *Petitioner-Appellee,*	)
v.	)
Clarice Stovall, *Respondent-Appellant.*	)

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor

No. 95-60304--Barbara K. Hackett, District Judge.

Argued: June 19, 1998

Before: MOORE, CLAY, and GILMAN, Circuit Judges.

CLAY, J., delivered the opinion of the court in Parts I.A., II.B., and II.C. below. GILMAN, J. (pp. 33-38),

delivered the opinion of the court in Part I. of his concurring opinion. MOORE, J. (pp. 3943), delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Petitioner, Theodore J. Lyons, was convicted in August of 1987 of first-degree criminal sexual assault and sentenced to a term of ten to twenty-five years of imprisonment for the rape of a mentally retarded woman who was confined to a community living facility where Petitioner worked as a staff member. After unsuccessfully appealing his conviction to the Michigan appellate courts, Petitioner filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The district court granted the petition, and ordered that the case be returned to the state forum for a new trial within 180 days. The state appealed, but did not move for a stay of the writ pending appeal. Petitioner moved for release pending the state's appeal; however, the district court denied Petitioner's motion based upon the severity of the offense and the strong likelihood of another conviction.

Because we find that Petitioner failed to exhaust his state court remedies, his case is not properly before us. However, in the interest of judicial economy, we will excuse Petitioner's lack of exhaustion and apparent procedural default because the evidentiary issue upon which he bases his federal constitutional claim seeks the retroactive application of a new rule of law which is barred under *Teague v. Lane,* 489 U.S.

288 (1989). Accordingly, we **REVERSE** the district court's order granting Petitioner's writ of habeas corpus.[1]

BACKGROUND

In March of 1983, Petitioner began working at the Hull Road Community Living Facility, a home for the mentally retarded, in Belleville, Michigan. Petitioner was shift supervisor and provided direct care to the residents, including feeding, bathroom assistance, and general personal care. At that time, approximately two of the six residents and five of the ten staff members at the home were men. On June 22, 1983, the victim, Evangeline McKenzie, became a resident at the home. Ms. McKenzie was both mentally and physically disabled in that she was profoundly retarded with an IQ below twenty and suffered from muscular dystrophy. She could not talk, feed or bathe herself, or use the bathroom without assistance.

In December of 1983, Dr. Mindy Smith, a family practice physician, examined Ms. McKenzie because it had been reported that Ms. McKenzie was exhibiting unusual behavior such as repeatedly hitting her abdomen while making sounds -- inasmuch as she could not speak words -- and that Ms. McKenzie had gained weight in her abdominal area. Dr. Smith diagnosed Ms. McKenzie as being pregnant, and opined that Ms. McKenzie was hitting her abdomen likely because

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[1] Judge Clay writes for the majority in reversing the district court's order granting Petitioner's application for writ of habeas corpus, and is joined by Judge Gilman in Parts I.A. and II.B. of the majority opinion.

she could feel fetal movement. Based upon records kept at the facility indicating that Ms. McKenzie's last menstrual period had begun on June 15, 1983, as well as upon her physical examination of Ms. McKenzie's uterus and abdomen, and the results of an ultrasound examination, Dr. Smith determined that as of December 8, 1983, Ms. McKenzie was 20.5 weeks pregnant.

Ms. McKenzie gave birth to a boy, Jonathan McKenzie, on March 24, 1984, and she died seven months later. Jonathan, who also was profoundly retarded, died in October of 1984. Dr. Karen Bartscht, a physician who assisted in Jonathan's delivery, opined that Jonathan was premature and estimated that conception had taken place between June 15 and June 25, 1983. Dr. Bartscht had examined Ms. McKenzie on February 15, 1994, about six weeks before delivery, and determined that Ms. McKenzie was a few days over thirty weeks pregnant. At the time of delivery, Dr. Bartscht drew blood samples from Ms. McKenzie and Jonathan, and the samples were sent to the state police crime laboratory.

Inasmuch as Ms. McKenzie was unable to communicate, blood samples were taken from the facility's two male residents, the five male direct-care providers other than Petitioner, as well as from the facility's director, in an attempt to determine paternity. Comparison of these blood samples with that of Ms. McKenzie and Jonathan excluded these men as being the possible father. Petitioner refused to voluntarily provide a blood sample, so a search warrant was obtained, and a blood sample was drawn. Petitioner's blood, along with that of Ms. McKenzie and Jonathan, were sent to the National Legal Laboratory where human leukocyte antigen

(HLA) tests revealed that the genetic markers in Petitioner's blood matched the genetic markers found in Jonathan's blood.[2] Based upon these findings, Petitioner was charged with first-degree criminal sexual assault.

At trial, the prosecution presented testimony from two expert witnesses, Dr. Walker and Dr. Gershowitz, to explain the HLA test results that each had performed. The experts each characterized the results of the tests in three different statistical forms: 1) the probability of exclusion, 2) the combined paternity index, and 3) the probability of paternity. Dr. Gershowitz and Dr. Walker opined that the probability of exclusion, which described the strength of the test by indicating its ability to exclude falsely accused men, was 95.5% and 99.5%, respectively. In other words, the experts opined that the results of the tests would exclude a falsely accused man with close to 100% accuracy. Except for Petitioner, the possibility of paternity was excluded as to all of the men tested in connection with this case. According to Dr. Walker, because it is not possible to prove paternity, the fact that Petitioner was not excluded as the father was "the most powerful evidence" in the case. Petitioner did not object to the admittance of the probability of exclusion evidence, and does not do so on appeal.

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[2] The genetic markers were described to the jury as "attributes that we inherit from our parents much like eye color, hair color, but they are invisible factors in the blood that we can detect with laboratory tests." (J.A. at 360, testimony by Dr. Walker.)

The combined paternity index expressed the likelihood that Petitioner was the father as opposed to a random man based upon the same genetic markers. Dr. Gershowitz described this test as an "odds statement." Specifically, he opined that "[i]t's the odds that this man is the father of this child compared to any other man in the population who might have been able to contribute the requisite genes." Dr. Gershowitz's test results indicated that the combined paternity index for Petitioner in this case was 303.8 to 1; or, put differently, Petitioner was about 304 times more likely to be Jonathan's father than a random man. Dr. Walker reported that, based upon his testing, Petitioner's combined paternity index was 429 to 1, or that Petitioner was 429 times more likely to be Jonathan's father than a random man. Petitioner did not object to the introduction of the combined paternity index statistics, and does not do so on appeal.

The probability of paternity statistics were based upon the same test results from the same genetic markers, but were expressed in terms of percentages as opposed to odds. Dr. Gershowitz converted the 303.8 to 1 combined paternity index odds found by his testing to a probability of paternity percentage of 99.7%. Dr. Walker converted the 429 to 1 combined paternity index odds found by his test results into a probability of paternity expression of 99.76%. The experts made it known to the jury that the probability of paternity percentages were calculated on the underlying mathematical assumption that Petitioner had had sexual intercourse with Ms. McKenzie; that the percentages had to be viewed and weighed by the jury in light of the other evidence admitted; and that if it were a known fact that Petitioner did not have sexual intercourse with the victim, the value of the probability of paternity would be zero percent. It is the probability of

paternity statistics to which Petitioner objected at trial, and objects to on appeal.

Petitioner was convicted by a jury of first-degree criminal sexual assault and sentenced to a term of ten to twenty-five years' imprisonment. Petitioner appealed his conviction, and the Michigan Court of Appeals affirmed. Petitioner sought leave to appeal his conviction to the Michigan Supreme Court; however, his application was denied. Petitioner then filed for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, raising the following two issues:

I. WERE PETITIONER'S RIGHTS TO THE PRESUMPTION OF INNOCENCE AND TO TRIAL BY JURY EVISCERATED BECAUSE OF THE INTRODUCTION OF HIGHLY PREJUDICIAL TESTIMONY AND ARGUMENT REGARDING THE PURPORTED STATISTICAL PROBABILITY OF PETITIONER'S PATERNITY?

II. WERE PETITIONER'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS VIOLATED BECAUSE OF THE PROSECUTOR'S CROSS-EXAMINATION WHICH SUGGESTED THAT PETITIONER WAS GUILTY BECAUSE THE POLICE WERE REQUIRED TO

SEEK A SEARCH WARRANT TO OBTAIN HIS BLOOD?

United States Magistrate Judge Marc Goldman recommended that the petition be granted because 1) calculation of the so-called "probability of paternity" statistics by the experts depended on an underlying mathematical assumption that Petitioner had had sexual intercourse with Ms. McKenzie, and 2) the prosecutor's question on cross-examination regarding Petitioner's refusal to provide a blood sample without a warrant was in violation of Petitioner's Fourth Amendment rights. On July 30, 1997, United States District Judge Barbara Hackett issued an order accepting the magistrate's report and recommendation, and granting the writ of habeas corpus. The state filed this timely appeal.

ANALYSIS

I. Failure to Exhaust State Court Remedies

A.

The exhaustion provision of 28 U.S.C. § 2254 reflects a policy of federal-state comity, and requires a federal habeas petitioner to "fairly present" to the state courts the "substance" of his federal habeas claim prior to seeking such relief. *Picard v. Connor,* 404 U.S. 270, 275-78 (1971); *see Anderson v. Harless,* 459 U.S. 4, 6 (1982). "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose v. Lundy,* 455 U.S. 509, 518 (1982). "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a

federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts." *Picard,* 404 U.S. at 276. "A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose,* 455 U.S. at 518-19. The exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano,* 454 U.S. 1, 3 (1981) *(per curiam).*

In *Kilby v. Jones,* 809 F.2d 324, 325 (6th Cir. 1987), this Court found that a petitioner had failed to exhaust his state court remedies when he argued in state court that "his court-appointed trial counsel provided constitutionally ineffective legal assistance because he 'delegated' to counsel for a codefendant the 'factual investigation prior to trial,'" but argued in federal court that his counsel was ineffective in conducting the trial itself as well as in handling his motion to suppress. This Court held that because the basis for the petitioner's ineffective assistance of counsel claim as argued in the federal courts was not the same basis as argued in the state courts, the petitioner had not exhausted his state court remedies. *Id.*

Similarly, in the instant case, although Petitioner raised the evidentiary claim to the state appellate courts, he argued it on the basis that he was denied his Fourteenth Amendment right to a fair trial because the evidence was more prejudicial than probative, not because the evidence

violated the presumption of innocence as he argues to the federal courts.[3] As such, the Michigan state appellate courts

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[3] Specifically, Petitioner framed his question presented on this issue in his brief to the Michigan Court of Appeals, as well as in his brief for application for leave to appeal to the Michigan Supreme Court, as follows:

> Whether defendant was deprived of his right to due process and to a fair trial under the 14th Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution 1963 when the trial court admitted into evidence over objection testimony concerning the statistical probability of defendant's paternity of the child.

Brief for Defendant-Appellant on Appeal to the Michigan Court of Appeals at v, 20-29, *People v. Lyons*, No. 147006 (Mich. Ct. App. April 13, 1994); Brief for Defendant-Appellant on Application for Leave to Appeal to the Michigan Supreme Court at vii, 38-46, *People v. Lyons*, No. 99452 (Mich. Jan. 13, 1995). Furthermore, in the body of his briefs to the Michigan appellate courts, Petitioner argued that his right to due process and a fair trial was violated solely on the basis that the evidence was more prejudicial than probative. *See id.*

Although Petitioner's briefs which were submitted to the state appellate courts were not included in the Joint Appendix submitted in connection with this appeal, it is well-settled that "[f]ederal courts may take judicial notice of proceedings in other courts of record" and we have done so here by obtaining Petitioner's state appellate briefs from the Michigan appellate courts. *See Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969) (collecting cases), *cert. denied*, 397 U.S. 1065 (1970); *see also Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738

were denied a fair opportunity to consider and pass on the error that Petitioner claims in federal court -- that the use of evidence that assumes guilt violates the presumption of innocence.[4] *Picard*, 404 U.S. at 276; *Kilby*, 809 F.2d at 325; *see Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987) (finding that the "doctrine of exhaustion requires that the same claim under the same theory be presented to state courts before raising it in a habeas petition," and that the petitioner had not exhausted his state remedies because he based his claim of ineffective of assistance of counsel in the state courts on different grounds than he asserted in the federal courts).

(6th Cir. 1980).

[4] Petitioner does not claim that the alleged violation of his presumption of innocence infringed upon his Fourteenth Amendment right to a fair trial. Rather, Petitioner's habeas claim on this issue is based solely on the alleged violation of his presumption of innocence, standing alone. Because this Court will grant habeas relief only when the petitioner demonstrates actual prejudice in a state court proceeding to the extent that his trial "was rendered fundamentally unfair by a violation of the Constitution," *Norris v. Schotten*, 146 F.3d 314, 323 (6th Cir. 1998), in Judge Clay's view, it is questionable whether Petitioner's evidentiary claim, even if considered on the merits and found to be meritorious, would constitute grounds for reversible error because the presumption of innocence is not, in and of itself, an express constitutional right. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979).

Normally, Petitioner's failure to exhaust his state court remedies on the evidentiary claim would require dismissal of his entire petition. *See Rose,* 455 U.S. at 522 (holding that a federal district court must dismiss a state habeas petitioner's writ containing both unexhausted and exhausted claims). However, in *Granberry v. Greer,* 481 U.S. 129, 131-32 (1987), the Supreme Court held that although there is a strong presumption in favor of requiring a petitioner to exhaust his available state court remedies, the failure to do so is not an absolute bar to appellate consideration of his petition -- i.e., the doctrine of exhaustion is discretionary, not jurisdictional. For example, as in this case, where the state fails to raise the defense, the appellate court should "determine whether the interest of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." *Id.* at 134. Furthermore, it has been found that where "the federal constitutional claim was plainly meritless and it would be a waste of time and judicial resources to require exhaustion," nonexhaustion and procedural default should be excused.[5]

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[5] Under Michigan law, Petitioner has procedurally defaulted on his evidentiary claim inasmuch as he "may not file an application for leave to appeal from a judgment of conviction and sentence if [he] has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied." Mich. Ct. R. 7.205(F); *see Harris v. Reed,* 489 U.S. 255, 269-70 (1989) (O'Connor, J., concurring) (stating that "where a claim raised on federal habeas has never been presented to the state courts at all, . . . federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available

Cain v. Redman, 947 F.2d 817, 820 (6th Cir. 1991) (citing *Prather v. Rees,* 822 F.2d 1418, 1422 (6th Cir. 1987)).

In *Cain v. Redman,* this Court held that it was in the interest of judicial economy for the Court to hear the case before it "in spite of the unresolved issues of exhaustion and procedural default [because,] [a]lthough petitioner's federal constitutional claim [was] not plainly meritless, . . . it [could] not withstand the hurdle of the rule of *Teague v. Lane,* which forbids retroactive application of new rules of law." 947 F.2d at 820. The Court reasoned that a remand to the district court for a hearing on exhaustion and procedural default would be a waste of time because even if these issues were decided in the petitioner's favor, this Court would still be barred from hearing the merits of the petitioner's constitutional claim

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in state court"); *see also Lambrix v. Singletary,* 520 U.S. 518, 522-25 (1997) (noting that "[a] State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system," and therefore, it is wise to consider a procedural bar first in adjudicating a habeas petition except where judicial economy would be served in giving a *Teague* issue priority). Because Petitioner previously appealed his conviction as of right to the Michigan Court of Appeals and filed an application for leave to appeal to the Michigan Supreme Court, he would be procedurally barred from appealing his evidentiary claim to the Michigan appellate courts at this time. *See* Mich. Ct. R. 7.205(F). As such, further review of his claim in the federal system would be barred in the absence of cause and prejudice. *See Murray v. Carrier,* 477 U.S. 478, 485 (1986). *See* discussion *infra* Part I.B.

inasmuch as the petitioner relied upon a new rule of law that could not be applied retroactively on federal habeas review.[6] *Id.* Likewise, because Petitioner in this case seeks retroactive application of a new rule of law, in the interest of judicial economy, Petitioner's lack of exhaustion and apparent procedural default shall be excused where a hearing on cause and prejudice would be futile.

B.

If it were not for the application of *Teague* to this case, in the interest of comity Petitioner's application for writ of habeas corpus would be dismissed. As noted, the exhaustion requirement is grounded in principles of comity, such that the states should have the first opportunity to adjudicate and possibly correct an alleged violation of a state prisoner's federal constitutional right. *See Rose*, 455 U.S. at 515; *Norris v. Schotten*, 146 F.3d 314, 323 (6th Cir. 1998) (noting that a federal court may issue a writ of habeas corpus to correct a constitutionally infirm state court conviction "[u]pon

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[6] The "new rule" of law the petitioner in *Cain* sought to be retroactively applied was that espoused by the Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); namely, that jury instructions containing a presumption indicating that one intends the consequences of his voluntary actions are unconstitutional because they abridge the principles of presumption of innocence and allocation of burden of proof thereby depriving a defendant due process of law. *See Cain*, 947 F.2d at 819-22. Petitioner in the instant case seeks retroactive application of a similar new rule based upon an abridgment of the presumption of innocence.

[the] petitioner's exhaustion of available state remedies. . . .'"). The Supreme Court explained the exhaustion doctrine, and the role comity plays in its enforcement, as follows:

> Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Rose, 455 U.S. at 518 (internal quotation marks and citations omitted); *see* Blacks Law Dictionary 267 (6th ed. 1990) (defining "comity" as that where "courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect"). In *Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987), we stated that all other considerations aside, such as judicial efficiency, "if we thought that our disposition [of a petition] would negatively impact federal-state comity, we would dismiss for lack of exhaustion." In this case, the state has continually argued that the evidentiary claim raised by Petitioner is solely a matter of state law.

It is true that where a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, nonexhaustion should be excused. *See Granberry,* 481 U.S. at 135. However, in this case, although the district court granted Petitioner's application for writ of habeas corpus, the court also refused to release Petitioner from jail pending appeal of the district court's decision due to the severity of the offense and the strong likelihood of another conviction. Thus, Petitioner's rights would not be offended by failing to excuse his nonexhaustion. *See, e.g., O'Neal v. McAninch,* 513 U.S. 432, 442 (noting that under habeas review, we "are dealing . . . with an error of constitutional dimension -- the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person").

In *Prather,* this Court excused the petitioner's failure to exhaust and addressed the merits of his constitutional claims for the following reasons:

> Because [the petitioner's] petition is so plainly meritless, addressing the merits of his claim will be efficient and will not offend federal-state comity. Efficiency includes bringing criminal litigation to a final conclusion. To return this case to the district court for a hearing on exhaustion, possible state post-conviction remedies, and perhaps still another habeas corpus proceeding, would greatly and wastefully expend judicial resources. Even so, if we thought our disposition would negatively impact federal-state comity, we would dismiss for lack of exhaustion. But where, as here, the petition is meritless, the state's attorney

> concedes the issue of exhaustion, and our disposition will not affect the state court's decision, comity and efficiency are served, not offended.

822 F.2d at 1422. Here, however, any decision to excuse Petitioner's failure to exhaust is inapposite to *Prather* in that it supports an inverse proposition. That is to say, a decision to excuse Petitioner's failure to exhaust and apparent procedural default to find Petitioner's evidentiary claim meritorious thereby *would affect* the state court's decision, and comity and efficiency would be *offended*, not *served*. *See O'Guinn v. Dutton*, 88 F.3d 1409, 1411-13 (6th Cir. 1996) (*per curiam en banc*).

Furthermore, it appears that a heating to determine cause for and prejudice due to the apparent procedural default would be futile despite the application of *Teague*. *See supra* note 5. To satisfy the cause requirement, a habeas petitioner must make "a showing of some external impediment preventing counsel from constructing or raising the claim." *Carrier*, 477 U.S. at 492. "IT]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Id.; see Engle v. Isaac*, 456 U.S. 107 (1982). Here, Petitioner raised a challenge to the evidence in question in the state appellate courts; however, he failed to base his challenge on the grounds upon which he rests on appeal. His failure to recognize these alternative grounds or failure to raise them despite recognizing them below, cannot constitute cause. *Carrier*, 477 U.S. at 492. Prejudice may be shown if the constitutional error "had a substantial and injurious effect or

influence on the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Petitioner did not suffer prejudice from the admittance of this evidence. Likewise, the facts of this case do not present the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent," thereby allowing us to excuse the lack of cause and prejudice. *Carrier*, 477 U.S. at 496.

Accordingly, it appears that Petitioner's evidentiary claim would be barred from our review even without the application of *Teague v. Lane*.

II. *Evidentiary Claim Barred by Teague v. Lane*

A.

In *Teague v. Lane*, 489 U.S. 288, 316 (1989), the Supreme Court held "that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review. . . ." The Court has made it clear that the application of *Teague*, while being a threshold question in a federal habeas case, "is not 'jurisdictional' in the sense that [federal courts]. . . must raise and decide the issue sua sponte." *Collins v. Youngblood*, 497 U.S. 37, 41 (1994). Conversely, the Court has also made it clear that, if raised, a federal court *must* apply *Teague*:

> We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide

> the issue *sua sponte." Collins v. Youngblood,* 497 U.S. 37, 41, 110 S. Ct. 783,788, 127 L. Ed. 2d 47 (1994). . . . *But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply Teague before considering the merits of the claim. Graham v. Collins,* 506 U.S. 461,466-67, 113 S. Ct. 892, 897-898, 122 L. Ed. 2d 260 (1993).

Caspari v. Bohlen, 510 U.S. 383, 389 (1994) (emphasis added). However, until recently, the Court had not provided the lower courts with guidance as to what procedural formalities were necessary to constitute a properly raised *Teague* claim. *See* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane,* 69 N.C.L. Rev. 371, 416 (1991). Indeed, in the aftermath of *Teague,* the circuits have grappled with what procedural requirements were necessary for a state to preserve its *Teague* argument -- i.e., what procedural requirements were necessary to render the Court's application of *Teague* mandatory. *See, e.g., Wilmer v. Johnson,* 30 F.3d 451, 454-55 (3rd Cir. 1994); *Epperly v. Brooks,* 997 F.2d 1, 9 n. 7 (4th Cir. 1993); *Jordan v. DuCharme,* 983 F.2d 933, 936 (9th Cir. 1993); *Williams v. Dixon,* 961 F.2d 448, 457-59 (4th Cir. 1992); *Boardman v. Estelle,* 957 F.2d 1523, 1534-37 (9th Cir. 1992).

Then, in the case of *Goeke v. Branch,* 514 U.S. 115 (1995), the Supreme Court brought clarity to the confusion by definitively announcing the procedural prerequisites necessary for a properly raised *Teague* claim. In *Goeke,* the habeas petitioner appealed to the Eighth Circuit, arguing that she had

stated a procedural due process violation, and that the district court's denial of her petition should therefore be reversed. *Id.* at 117. At oral argument, the panel suggested that the petitioner's claim may have actually been based on substantive due process grounds, rather than procedural due process grounds. *Id.* The petitioner's counsel "welcomed the suggestion" and argued the substantive due process claim before the court. *Id.* This was the first time that the substantive due process argument was raised and argued. *Id.* In turn, the state argued that any substantive due process argument was barred by the application of *Teague*. *Id.* The record indicated that several questions and answers were exchanged at oral argument by the state and the panel regarding the application of *Teague* to the substantive due process claim. *Id.* at 118. Thereafter, the Eighth Circuit held that the petitioner's substantive due process rights had been violated, and reversed the district court's decision without addressing the state's *Teague* claim. *Id.* at 117. Then, after denying the state's motion for rehearing *en banc*, the majority modified its opinion to explain that it had not confronted the applicability of *Teague* to the petitioner's claim because the state had waived the issue. *Id.* (citing *Branch v. Turner*, 37 F.3d 371, 374-75 (1994)).

The Supreme Court granted certiorari and reversed the Eighth Circuit, finding that the state had preserved the *Teague* argument as applied to the petitioner's substantive due process claim, even though the claim was addressed for the first time at oral argument. *Id.* at 118. The Court reasoned that because the state had made efforts to "alert the Eighth Circuit to the *Teague* problem [so as to] provide[ ] the court with ample opportunity to make a reasoned judgment on the

issue, . . . the state did not waive the *Teague* issue."[7] *Id.* In short, *Goeke* now makes it clear that a federal court's *sua sponte* application of *Teague* is discretionary; however, when raised by the state, a federal court's application of *Teague* is mandatory, even when raised for the first time at the first hearing on appeal as long as the state provides the appellate court with ample opportunity to make a reasoned judgment on the issue.

This conclusion is supported by a decision from the Court of Appeals for the Second Circuit. In *Ciak v. United States*, the Second Circuit was asked to consider whether the district court erred in denying the petitioner a writ of habeas corpus under the automatic reversal rule, where the trial judge failed to inquire into the possible conflicts of interest of the petitioner's trial counsel. 59 F.3d 296, 301 (2d Cir. 1995). The state argued that the automatic reversal rule was not applicable because the rule only applied to cases on direct appeal. *Id.* The state did not, however, argue that the automatic reversal rule could not be applied to the petitioner's case under *Teague*. *Id.* at 302. In analyzing whether the district court erred in denying the writ, the Second Circuit found that the state had waived a *Teague* claim under *Goeke* because it "did not argue *in its brief or at oral argument* that Teague bar[red] application of the automatic reversal rule." *Ciak*, 59 F.3d at 302 (citing *Goeke*, 514 U.S. at 118)

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[7] Although the state had raised its *Teague* claim as applied to the procedural due process claim in the district court, it did not raise or argue its application to the legally distinct substantive due process claim at the district court level. *Goeke*, 514 U.S. at 118.

(emphasis added). In other words, under *Goeke*, the *Ciak* Court would not have considered a *Teague* argument waived had the state raised the claim in its brief on appeal or at oral argument before the Court, even though the state had not raised *Teague* in the district court.

In fact, authority existed "pre *Goeke*" to support the same conclusion. In a habeas appeal to the Court of Appeals for the Fourth Circuit, the Court found that the state had waived its *Teague* argument "by its failure to raise the issue at the district court level *or* at the first hearing before this court." *Williams v. Dixon*, 961 F.2d 448, 459 (4th Cir.), *cert. denied*, 506 U.S. 991 (1992) (emphasis added). By using the disjunctive "or" as opposed to the conjunctive "and," the Fourth Circuit expressly found that it would have considered a *Teague* argument raised for the first time at the first hearing before the Court. Therefore, authority existed before *Goeke* was decided to support the proposition that a state need not necessarily raise a *Teague* claim at the district court level in order to preserve the issue for appellate review.

Accordingly, in the instant case, the state properly preserved its *Teague* claim for our review because the state argued in both its brief on appeal to this Court as well as at oral argument that the application of *Teague* barred the relief sought. For example, at oral argument, the state argued its *Teague* claim as follows:

> THE STATE:[I]t would seem then that if there is no federal case on point, then this evidence is inadmissible, then under *Teague v. Lane*, this would be a new rule.

THE COURT:

(Moore, J.) Did you raise your *Teague* argument earlier?

THE STATE: No, but I would say this about it. In the district court I did not. I say it's not analogous to a default argument as the petitioner argues because it's not something that can be waived. It doesn't involve the questions of federalism and comity. It's an administrative rule actually. Administrative in the sense that it's the way that the Supreme Court says that we will handle these cases of new rules. So, I didn't say that, but I think it's subsumed in my argument when I say that this is not a federal question and I have consistently said that before the magistrate, the district court, this is not a federal question, it is a state evidentiary question. But also, the magistrate when he made his ruling, well the petitioner argued in response to me that the legal landscape would have required application of this rule and the legal landscape that he's referring to are those four state cases, which was also the basis for the magistrate's ruling. But three of those four cases were decided as a matter of state evidentiary law, only one of them -- a Connecticut case -- deals with federal constitutional matters. That was over-looked by the magistrate. Also, the fact that the dissenting justice of the Wisconsin Supreme Court noted that there were various

> jurisdictions that do permit the admissibility of this probability testimony, at least four of them I think the dissenting justice noted.
>
> THE COURT:
>
> (Moore, J.) Counsel, you've used your full 15 minutes.
>
> THE STATE: Thank you.
>
> THE COURT:
>
> (Moore, J.) Thank you.

Lyons v. Stovall, No. 97-1894, Oral Argument by Respondent, June 19, 1998. In addition, Petitioner responded to the state's *Teague* claim in his brief on appeal to this Court, and argued why he believed that *Teague* did not bar his evidentiary claim. *See* Petitioner-Appellee's Final Brief on Appeal at 2331. Accordingly, the record indicates that the state's efforts to alert this Court to the *Teague* problem "provided th[e] court with ample opportunity to make a reasoned judgment on the issue." *Goeke,* 514 U.S. at 118. Thus, under *Goeke,* and as reinforced by *Ciak and Williams,* it is clear that the state properly raised and preserved its *Teague* claim, albeit for the first time on appeal; as such, this Court's application of the rule is mandatory. *See Caspari,* 510 U.S. at 389. Furthermore, as noted *infra* in this discussion, the improvidence of advancing new rules of law on collateral review provides support for finding that the preservation of *Teague's* application should not be limited or

held to wooden literalness. *See Solem v. Stumes*, 465 U.S. 638, 654 n.4 (1984) (Powell, J., concurring).

However, relying upon *Sinistaj v. Burt*, 66 F.3d 804, 805 n.1 (6th Cir. 1995) and *Kordenbrock, v. Scroggy*, 919 F.2d 1091, 1104 n. 4 (6th Cir. 1990) *(en banc)*, Petitioner claims that the state waived its *Teague* argument inasmuch as the state failed to raise this argument either to the magistrate judge or in its objections to the magistrate judge's report and recommendation that it submitted to the district judge. In light of Supreme Court precedent, the cases relied upon by Petitioner are distinguishable and ill-decided. For example, the case at hand is distinguishable from *Kordenbrock*. In that case, this Circuit found that the state's failure to raise a *Teague* argument at *any* stage of the proceeding constituted a waiver of the argument. 919 F.2d at 1104 n.4. True enough, a federal court may exercise its discretion and consider a *Teague* argument waived if not raised by the state at all; however, it is equally true that, once raised, a federal court *must* apply *Teague*. *See Caspari*, 510 U.S. at 389. Accordingly, although *Kordenbrock* was properly decided in that *Teague* was never raised by the state, it is also distinguishable from the facts of the instant case, and Petitioner's reliance on *Kordenbrock* is thus misplaced.

Furthermore, Petitioner's reliance on *Sinistaj* is misplaced because that case was wrongly decided in light of *Goeke*. In *Sinistaj*, a case decided "post-*Goeke*," a panel of this Court held that the state waived its *Teague* argument because it raised the issue for the first time in its motion to amend the district court's judgment. 66 F.3d at 806 n. 1. The *Sinistaj* court relied upon *Caspari* in support of its finding. *Id.* However, *Caspari* simply states that a federal court need

not raise and decide *Teague sua sponte*. 510 U.S. at 389. *Goeke*, on the other hand, specifically states that *Teague* need only be raised by the state to the extent that it allows the appellate court ample opportunity to make a reasoned judgment before *Teague's* application is mandatory -- even when the state raises *Teague* for the first time at the first hearing before the appellate court. 514 U.S. at 117-18. Therefore, inasmuch as *Goeke* had already been decided at the time the *Sinistaj* court rendered its decision, *Sinistaj* is in direct contravention to Supreme Court precedent, and Petitioner's reliance on *Sinistaj* is also misplaced and unfounded.

Accordingly, in the case at hand, having found that the state properly preserved its *Teague* argument, and that *Teague* must therefore be applied, it is dispositive. As argued by the state, any decision announcing that the presumption of innocence is violated by the use of evidence which assumes a statistical probability of guilt would be a "new rule" under *Teague*, and therefore cannot be used as grounds for granting the petition for habeas relief.[8]

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[8] Furthermore, irrespective of the state's preservation of its *Teague* defense, based upon the new rule proposed by Petitioner, if ever there was a time for this Court to raise and decide a *Teague* claim *sua sponte*, surely it is here. *See Caspari* 510 U.S. at 389 (citing *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) ("a federal court may, but need not, decline to apply *Teague* if the State does not argue it," i.e., a federal court's decision whether to apply *Teague* when not raised by the state is discretionary).

B.

Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* In determining whether the relief requested would constitute a new rule, the question becomes "'whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Caspari*, 5 I0 U.S. at 390 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

There are two exceptions to *Teague's* general proposition that new rules should not be applied retroactively to cases on collateral review. The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[9] *Teague*, 489 U.S. at 307 (internal quotation marks omitted). The second exception to *Teague's* nonretroactivity permits the application of

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[9] It is undisputed that this exception is inapplicable here. The new rule proposed by Petitioner, that the use of evidence that assumes a statistical probability of guilt violates the presumption of innocence, does not "decriminalize" any class of proscribed conduct. *See Gilmore v. Taylor*, 508 U.S. 333, 342 (6th Cir. 1993).

"'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311). "A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (internal quotation marks and citations omitted). This exception encompasses a "small core of rules requiring 'observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *Graham v. Collins*, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U.S. at 311) (internal quotation marks omitted). The rule espoused in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that a defendant has the right to be represented by counsel in all criminals trials for serious offenses, is often cited as an example of a rule falling within this exception, although the precise contours of this exception may be difficult to discern. *See Saffle*, 494 U.S. at 495.

Here, although Petitioner argues that the state waived its *Teague* argument, he also contends that should the Court find otherwise, the application of *Teague* does not bar the relief sought because the district court did not state a new rule of law in holding that probability evidence which assumes a statistical probability of guilt violates the presumption of innocence; and that, even assuming that a new rule was espoused, it falls into *Teague's* second exception for nonretroactivity. Both of Petitioner's contentions are meritless.

First, the district court clearly set forth a "new rule" under *Teague* because the Michigan appellate courts had no

legal basis at the time that they adjudicated Petitioner's case to feel "compelled by existing precedent to conclude that the rule [Petitioner sought] was required by the Constitution." *Saffle*, 494 U.S. at 488. Precedents which "inform or even control or govern" the intervening decision do not keep it from being a new rule if the precedents do not "compel" the decision. *Id.*

Petitioner argues that if the Michigan appellate courts "had conducted a survey of the legal landscape at the time Mr. Lyons' conviction became final in April 1995, they would have felt compelled by existing precedent to conclude that the rule he seeks was then required by the Constitution." Petitioner relies upon case law from other state court jurisdictions in support of his contention. However, the Michigan courts were not bound by decisions from these other state jurisdictions and therefore surely would not have felt "compelled" to embrace them.[10]

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[10] Petitioner criticizes the Michigan Court of Appeals opinion in this case claiming that the case law upon which the court relied in adjudicating this issue was inapposite. *See People v. Lyons*, No. 147006, slip op. at 2 (Mich. Ct. App. April 13, 1994) (J.A. at 133-34). Petitioner argues that: "Inexplicably, the Michigan Court of Appeals failed to recognize any of the problems inherent in the State's probability testimony," and notes that the case relied upon by the court did not involve the probability of paternity statistics nor the presumption of innocence. However, as noted at the outset of this opinion, Petitioner never raised the presumption of innocence violation at the state court level. His claim before the state appellate courts on this issue was strictly based upon the contention that the evidence was more prejudicial than probative, thereby denying him of his right to a fair trial. As

In addition, Petitioner also claims that his legal proposition, that the use of evidence that assumes a statistical probability of guilt violates the presumption of innocence, is not a new rule because it flows directly from bedrock principles stated in long-established federal law cases embracing the presumption of innocence. However, Petitioner's argument is without merit because those cases did not speak to the specific violation of the presumption of innocence alleged here. *See, e.g., Estelle v. Williams,* 425 U.S. 501, 503 (1976). In *Cain v. Redman,* 947 F.2d 817, 821-22 (6th Cir. 1991), this Court concluded that the rule espoused by *Sandstrom v. Montana,* 442 U.S. 510, 524 (1979) -- that jury instructions containing a presumption indicating that one intends the consequences of his voluntary actions are unconstitutional because they abridge the principles of presumption of innocence and allocation of burden of proof thereby denying a defendant due process of law -- was a new rule under *Teague* despite these long-established federal cases embracing the presumption of innocence.

As the Court in *Cain* recognized, "a legal ruling sought by a federal habeas petition will be deemed 'new' as long as the correctness of the rule is susceptible to debate among reasonable minds." 947 F.2d at 821 (citing *Butler v. McKellar,* 494 U.S. 407, 110 S. Ct. 1212, 1217 (1990)). Here, it is "susceptible to debate" as to whether the

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such, the Michigan court's failure to address the claim on the grounds that the evidence infringed on Petitioner's presumption of innocence is quite "explicable."

probability of paternity statistics violate the presumption of innocence, inasmuch as courts have allowed the use of these statistics without finding error. *See State v. Wisconsin,* 426 N.E.2d 320, 329 (Wis. 1988) (Steinmetz, J., dissenting) (collecting cases from jurisdictions that allow the use of the statistics in question); *see also Coe v. Bell,* 161 F.3d 320, 353 (6th Cir. 1998) (finding that a result is not dictated by precedent "when courts have reached divergent results on an issue before resolution by the Supreme Court"); *Cain,* 947 F.2d at 821 (noting the fact that the jury instructions found to be unconstitutional were routinely given without challenge rendered their correctness "susceptible to debate among reasonable minds"). Therefore, Petitioner's claim that the rule he advocates is not a "new rule" under *Teague* is without merit.

Furthermore, Petitioner's alternative claim that the rule falls under *Teague's* second exception to nonretroactivity – those rules which "implicat[e] the fundamental fairness and accuracy of the criminal proceeding" -- is also without merit. *Teague,* 489 U.S. at 311. Petitioner argues that the rule falls under *Teague's* second exception inasmuch as the rule is based upon protecting a defendant's presumption of innocence which lies at the cornerstone of this country's criminal justice system. However, because the new rule lacks the "primacy and centrality of the rule adopted in *Gideon,* "it does not rise to the level of the second exception. *See Saffle,* 494 U.S. at 495.

As noted, the petitioner in *Cain v. Redman* sought to apply retroactively the new rule espoused by the Supreme Court in *Sandstrom v. Montana,* 442 U.S. 510, 524 (1979), which was also premised upon a defendant's presumption of

innocence; namely, that jury instructions containing a presumption indicating that one intends the consequences of his voluntary actions are unconstitutional because they abridge the principles of the presumption of innocence and the allocation of the burden of proof, thereby depriving a defendant of due process of law. *Cain*, 947 F.2d 817, 819-22 (6th Cir. 1991); *see supra* note 3 and accompanying text. The district court found that the petitioner could not invoke the *Sandstrom* rule inasmuch as this new rule did not fall under either of *Teague's* exceptions, specifically *Teague's* second exception, and this Court agreed. *Id.* at 822 (citing *Cain v. Redman*, 757 F. Supp. 831, 835 (W.D. Mich. 1990)). This Court noted that the new rule was "not within the narrow category of fundamental bedrock procedural elements that come within this exception," and adopted the district court reasoning as follows:

> The second *Teague* exception is reserved for "'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, [--- U.S. ---], 110 S. Ct. [2822] at 2831 [111 L. Ed. 2d 193 (1990)] (citing *Saffle*, 110 S. Ct. at 1263). Although the precise contours of this exception may be difficult to discern, the Supreme Court has "usually cited *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of role coming with the exception." *Saffle*, 110 S. Ct. at 1264. To fit within the second

> exception, a new rule must do more than improve the accuracy of the trial; it must alter the understanding of the "bedrock procedural elements essential to the fairness of a proceeding." *Sawyer,* 110 S. Ct. at 2831. Against these standards, I conclude that *Sandstrom* does not represent one of the "watershed" rules envisioned by *Teague.*

Cain, 947 F.2d at 822 (quoting *Cain v. Redman,* 757 F. Supp. at 835).

Accordingly, inasmuch as a panel of this Court has held that a new rule which found that a jury instruction is unconstitutional because it violated a defendant's due process rights by infringing upon the defendant's presumption of innocence did not fall under *Teague's* narrow second exception, the similar new rule proposed in this case -- that use of evidence which assumes a statistical probability of guilt infringes upon a defendant's presumption of innocence -- would likewise not rise to the level of one of the "watershed" rules envisioned by *Teague.* In fact, the *Sandstrom* rule presents an even more compelling case for finding such an exception, inasmuch as the rule deals with a jury instruction that infringed upon the defendant's presumption of innocence, as opposed to the situation in this case where it is alleged that evidence which the jury could weigh and consider as it saw fit infringed upon Petitioner's presumption of innocence.

Furthermore, the new rule proposed by Petitioner is along the lines of that pronounced in *Caldwell v. Mississippi,* 472 U.S. 320 (1989), which the Supreme Court later found to be a new rule that did not fit into either of the two exceptions

set forth under *Teague*. *See Sawyer v. Smith*, 497 U.S. 227, 242 (1990). *Caldwell* held that the Eighth Amendment prohibits the imposition of the death penalty where it was found that the sentencer had been led to believe that the responsibility for determining the appropriateness of the defendant's capital punishment lie elsewhere. 472 U.S. at 328-29. The petitioner in *Sawyer* argued that the rule espoused in *Caldwell* should fall under the second exception to nonretroactivity. 497 U.S. at 242. The petitioner contended that the second exception "should be read to include new rules of capital sentencing that 'preserve the accuracy and fairness of capital sentencing judgments.'" *Sawyer*, 497 U.S. at 242. The Supreme Court, however, disagreed with the petitioner, because his argument disregarded the second requirement of the exception; namely, that the rule must also "'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Id.* (quoting *Teague*, 489 U.S. at 311). Inasmuch as the Court found that *Caldwell* failed to meet this latter requirement, it affirmed the Fifth Circuit's denial of the writ. *Sawyer*, 497 U.S. at 495.

In addition, the Supreme Court has found it unlikely that a new rule will emerge in modem jurisprudence which alters our understanding of the criminal procedure essential to the accuracy and fairness of a trial. *See Teague*, 489 U.S. at 313 (finding that it is "unlikely that many such components of basic due process have yet to emerge"). Accordingly, the new rule purported here fails to alter our basic understanding of the "bedrock procedural elements" essential to the fairness of the proceeding, particularly where this Court has found that a similar new rule did not fall under this narrow exception and where it is rare to find such a rule in today's jurisprudence.

The "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309 (citing Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970)). Perhaps Justice Powell best summarized the improvidence of advancing new rules on collateral review in his concurrence in *Solem:*

Retroactive application on habeas corpus of constitutional rules governing criminal procedure is unnecessary to advance the purposes of habeas corpus, even under a regime that permits the federal courts on habeas to vacate a final conviction on any properly preserved ground of federal constitutional error. Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of conviction is all that is required to "forc[e] trial and appellate courts . . . to toe the constitutional mark." Nor will fundamental fairness require complete retroactivity, except in rare instances. Because retroactive application of new rules of constitutional law generally does little to advance the purposes of collateral relief on habeas, it is particularly difficult in such cases to justify imposing upon the state the costs of collateral review. These are not insubstantial. They include "the burden on judicial and prosecutorial resources entailed in retrial" and "the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense." Retroactive application of constitutional rules frustrates the state's enforcement of its criminal law despite the state's careful adherence to the federal constitutional standards that governed at the time of the prisoner's conviction.

Solem, 465 U.S. at 653-54 (Powell, J., concurring) (citations and footnotes omitted). For the reasons set forth herein and best summarized by Justice Powell, retroactive application of the new rule proposed by Petitioner is barred by *Teague v. Lane*.

C.

In the dissent, Judge Moore begins her analysis with the presumption that "the state, like any other litigant, loses a defense it fails to raise," and notes that "[t]his presumption is consistent with our general approach to waivers of claims and defenses in civil litigation, and is consistent with our strict enforcement of the procedural requirements imposed on criminal defendants and habeas petitioners."[11] However, in making this presumption, and ultimately finding that the state waived its *Teague* defense, Judge Moore fails to hold Petitioner to this presumptive standard. In other words, Judge

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[11] Notably, the new statutory requirement in the Antiterrorism Effective Death Penalty Act of 1996 ("ADEPA"), that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement," casts doubt upon Judge Moore's presumption that a state loses a defense that it fails to raise, at least as it pertains to habeas petition from a state court prisoner. *See* 28 U.S.C.A. § 2254 (b)(3) (West Supp. 1998). However, the ADEPA does not apply to Petitioner here because he filed his petition for writ of habeas corpus prior to the enactment of the ADEPA. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

Moore focuses on the state's failure to raise the exhaustion and *Teague* defenses; however, in doing so, she palliates Petitioner's failure to exhaust his state court remedies on his evidentiary claim, as well as his what would likely be his apparent procedural default. Therefore, it appears that Judge Moore is using the procedural requirements in this case as both a sword and a shield, where she holds the state and Petitioner to a double standard. On the one hand she excuses the Petitioner's failure to exhaust his state court remedies and apparent procedural default; and yet, on the other hand, she refuses to excuse the state's failure to raise the exhaustion and *Teague* defenses. Under the facts of this case, such an outcome particularly unsettling.

Furthermore, when applying the factors such as federalism, comity, and finality to determine whether to apply *Teague sua sponte* in this case, as suggested by Judge Moore, it is clear that these factors weigh in favor of *Teague's* application. As noted in Section I., there are strong comity concerns in this case, and it would serve in the best interests of finality to apply *Teague* inasmuch as the district court itself -- the court which granted Petitioner's application for the writ -- found that there is a strong likelihood of reconviction here. This is likewise true for the factor that Judge Moore believes weighs particularly in favor of declining to apply *Teague sua sponte* -- the interests of justice. Judge Moore notes in her dissent that the interests of justice include "actual innocence, whether the proper resolution of the merits of the claim is clear, and whether the district court granted habeas relief." However, a thorough application of these factors weighs in favor of applying *Teague* here. First, as noted, there is a strong likelihood that Petitioner would be convicted of this crime again; therefore, his innocence is highly questionable.

Second, the resolution of the merits of Petitioner's claim is far from clear and the case law from the several jurisdictions which allow the use of the statistical data in question. *See State v. Wisconsin,* 426 N.E.2d at 329 (collecting cases from jurisdictions which allow the use of the statistics in question). Third, although it is true that the district court granted habeas relief, it also refused to release Petitioner from prison pending this appeal. Accordingly, in the interests of justice, *Teague* should be applied here.[12]

CONCLUSION

In summary, because Petitioner failed to exhaust his state remedies regarding the legal basis upon which the evidentiary claim is made in federal court, this case is not properly before us on habeas review. However, in the interest of judicial economy, we will excuse the lack of exhaustion because Petitioner's evidentiary claim is barred under the doctrine of *Teague v. Lane,* and thus dispositive of this case.

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[12] Indeed, it may be argued that in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress somewhat codified *Teague* to the extent that under the auspices of the AEDPA, federal habeas review is limited to determining whether a state court's decision on the merits of a petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C.A. § 2254(d)(1) (West Supp. 1998). As such, it appears that the trend in the law in reviewing a state prisoner's habeas petition is to apply *Teague. See id.*

Accordingly, the district court's order granting Petitioner's writ of habeas corpus is **REVERSED**.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring in part. I concur in the end result reached by Judge Clay as well as in the analysis set forth in Parts I.A., II.B., and II.C. of his opinion.[1] Because I believe that the state waived its *Teague* defense in this case, however, I disagree with the analysis as set forth in Part II.A. of his opinion.(1) In addition, I decline to join in Judge Clay's analysis as set forth in Part I.B. because I find it unnecessary to address hypothetical circumstances that are not present in the instant case.

I Waiver of the *Teague* defense

Relying primarily on *Goeke v. Branch,* 514 U.S. 115 (1995) (per curiam), Judge Clay concludes that the state properly preserved its *Teague* defense. According to Judge Clay, *Goeke* held that "a federal court's application of *Teague* is mandatory, even when raised for the first time at the first hearing on appeal." I believe that Judge Clay has misapprehended the *Goeke* holding. The habeas petitioner in

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[1] Because Judge Moore concurs in the analysis set forth in Part I below, this reflects the panel's majority opinion as to the issue there discussed.

Goeke argued in the district court that the state court's dismissal of her appeal, based upon Missouri's fugitive dismissal rule, constituted a violation of due process. This argument was construed by the district court as a procedural due process claim. In response, the state argued that the petitioner's claim was barred by *Teague:* "In the District Court, the State argued that respondent's due process claim is barred from litigation in federal habeas corpus unless the Court could say, as a threshold matter, that it would make its new rule of law retroactive. *Teague v. Lane." Id.* at 117 (internal quotation marks omitted). The state again raised the *Teague* defense on appeal, noting that it had also raised this defense at the district court. *See id.* The Eighth Circuit, after relabeling the petitioner's due process argument as substantive rather than procedural, ultimately held that the state had waived the *Teague* defense, and addressed the merits of the case. *See id.*

The Supreme Court reversed the Eighth Circuit's opinion, holding that the state had properly preserved its *Teague* defense. *See id.* at 118. Contrary to Judge Clay's interpretation, the Court did not hold that the state could assert this defense for the first time on appeal. Rather, the Court clearly indicated that *Teague* was raised at both the district and appellate levels in response to the same issue, regardless of whether it was characterized as procedural or substantive. *See id.* at 117-18. The Court's statement that "[t]he State's efforts to alert the Eighth Circuit to the *Teague* problem provided that court with ample opportunity to make a reasoned judgment on the issue," *id.* at 118, is therefore not inconsistent with the undisputed fact that the state first asserted its *Teague* defense at the district court level.

Judge Clay acknowledges that the *Teague* defense in *Goeke* was first raised in the district court, but argues that the substantiative due process claim presented on appeal was "legally distinct" from the procedural due process claim presented in the district court. I respectfully disagree. The petitioner in *Goeke* raised the same issue -- that the state court's dismissal of her appeal based upon Missouri's fugitive dismissal rule constituted a violation of due process -- at both the district and appellate levels. In response, the government raised the *Teague* defense at both stages of the habeas litigation. I thus find no support in *Goeke* for the proposition that the *Teague* defense is properly preserved when raised for the first time on appeal. Nor did the court in *Goeke* face such a situation. In contrast, the state in the present case did not raise the *Teague* defense at all until the case reached the appellate level. *Goeke,* therefore, is not controlling.

In his opinion, Judge Clay cites two cases that he argues are supportive of his interpretation of *Goeke* -- *Ciak v. United States,* 59 F.3d 296 (2d Cir. 1995), and *Williams v. Dixon,* 961 F.2d 448 (4th Cir. 1992). In *Ciak,* the Second Circuit stated that the *Teague* defense was waived because the state "did not argue in its brief or at oral argument that *Teague* bar[red] application" of the new rule. 59 F.3d at 302. Similarly, the Fourth Circuit held in *Williams* that the state had waived its *Teague* argument "by its failure to raise the issue at the district court level or at the first heating before this court." 961 F.2d at 459.

Judge Clay draws an inference from these statements that both the Second and the Fourth Circuits would have held that the state had preserved its *Teague* defense even if raised for the first time on appeal. I, on the other hand, find that the

above-quoted statements provide faint support for such an inference. Both cases in fact held that the state had waived its *Teague* defense when belatedly raised for the first time on appeal, and neither faced the factual situation presently before us. Moreover, the *Williams* court specifically stated that "a state's failure to raise [its *Teague* defense to] the issue of retroactivity below constitutes waiver of that defense." *Id.*

I also note that both *Ciak* and *Williams* are cases from other circuits, and are therefore considered only for their persuasive value. As stated above, I do not find them persuasive for the proposition urged by Judge Clay. More importantly, this court has spoken on the very point at issue in *Sinistaj v. Burt,* 66 F.3d 804 (6th Cir. 1995). In *Sinistaj,* this court held that the state had waived its *Teague* defense by raising it for the first time in a motion to amend the district court's judgment. *See id.* at 805 n. 1. Logic dictates that if the *Teague* defense is waived when raised for the first time in a motion to amend the district court's judgment, it is certainly waived when raised for the first time at the appellate level. *Sinistaj* is therefore the controlling precedent in this circuit and is determinative of the present case.

For all of the reasons stated above, I would find that the state has waived its *Teague* defense.

II. *Sua sponte* application of the *Teague* defense

Although the *Teague* defense was not properly preserved by the state, we may exercise our discretion to raise the defense *sua sponte*. *See Caspari v. Bohlen,* 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it."). In

making the determination of whether to apply the *Teague* principle *sua sponte,* we should primarily focus on the fundamental policies underlying *Teague*. The Supreme Court has held that, with two narrow exceptions, a criminal defendant may not benefit from a new rule of constitutional law after direct review of his or her case. *See Teague,* 489 U.S. 288, 305-10 (1989). This ruling is based upon the "interests of comity and finality." *Id.* at 308. The habeas corpus process should "protect the finality of state court judgments and ensure comity between the federal and state court systems." *Jones v. Page,* 76 F.3d 831, 850-51 (7th Cir. 1996); *see also Fisher v. Texas,* 169 F.3d 295, 305 (5th Cir. 1999) ("In the interests of finality and judicial economy, we choose to exercise our discretion and consider whether [petitioner's] claim is barred."). In light of these fundamental principles, I believe that a federal court should presumptively apply the *Teague* analysis *sua sponte* whenever a defendant tries to raise a new constitutional rule for the first time on collateral review.

This presumption, however, is not irrebutable, and a federal court must consider whether the concerns of finality, federalism, and comity support *Teague's* application on a case-by-case basis. For instance, a federal appellate court should be particularly vigilant to any indication that the state intentionally neglected to raise the *Teague* defense at the district court level in the hope of getting a favorable determination on the merits, with the idea that it could then raise the issue for the first time at the appellate level if the ruling on the merits was adverse to its interests. Permitting such a practice would allow the state to "sandbag" the appellate court and benefit from its own strategic pleading.

In the present case, however, there is no indication that the state is sandbagging this court.

Although Judge Moore agrees that courts may raise the *Teague* defense *sua sponte,* she argues that courts should not invoke the defense *sua sponte* unless there are particularly strong reasons to overlook the state's neglect. In support of her position, she cites various cases in which this court has declined to raise the defense in the face of the state's waiver. *See Coe v. Bell,* 161 F.3d 320, 337 n. 1, 339 n.3 (6th Cir. 1998), *petition for cert. filed,* No. 98-9606 (May 24, 1999); *Sinistaj v. Burt,* 66 F.3d 804, 805 n.1 (6th Cir. 1995); *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1104 n.4 (6th Cir.) (en banc), *cert. denied,* 499 U.S. 970 (1991). These cases, however, fail to provide any analysis or reasoning for the court's decision not to raise the *Teague* defense *sua sponte,* and thus provide us with little guidance.

Furthermore, I disagree with the implication in Judge Moore's dissent that courts rarely if ever raise the defense *sua sponte.* The *Teague* rule itself was not briefed by the parties and yet was fashioned by the Supreme Court *sua sponte.* Moreover, the defense has been raised by courts *sua sponte* in subsequent cases, including *Saffle v. Parks,* 494 U.S. 484 (1990), *Penry v. Lynaugh,* 492 U.S. 302 (1989), *Fisher v. Texas,* 169 F.3d 295, 305 (5th Cir. 1999), and *Spaziano v. Singletary,* 36 F.3d 1028, 1041-42 (11lth Cir. 1994). *See* James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane,* 18 N.Y.U. REV. L. & SOC. CHANGE 537, 635 n.247 (1990-91).

Judge Moore further argues that it is particularly unfair for the court of appeals to apply *Teague* once another federal court has declared that a constitutional violation has occurred. I respectfully disagree for two reasons. First, the entire thrust of *Teague* is to limit the issues that can be raised on habeas review, irrespective of the "fairness" of the outcome. Second, Congress expressed a policy choice in enacting AEDPA, as partially codified in 28 U.S.C. § 2254(d)(1), to have the public interest in finality outweigh a criminal defendant's interest in gaining the benefit of a new constitutional rule. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 30.2c, at 1240-41 (3d ed. 1998) ("In this way, section 2254(d)(1) . . . makes the *state court 'decision,'* and not the petitioner's 'independent' complaint, the focus of the federal court review . . . [S]ection 2254(d)(1) unqualifiedly limits federal review to legal rules that actually were *in effect* when the state court decided the case . . .") (emphasis in original); *see also Zuern v. Tare,* 938 F. Supp. 468, 475-76 (S.D. Ohio 1996) ("Congress intended by [§ 2254(d)(1)] to shield convictions which complied with federal law when entered from reversal by later habeas courts applying 'new' law.").

To the extent that the Supreme Court considered "fairness" in its *Teague* decision, such concern was encapsulated in the analysis itself that allows a habeas corpus defendant to gain the benefit of a new constitutional rule if the rule either (1) "places a class of private conduct beyond the power of the State to proscribe" or (2) is one of the "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal

proceeding." *Saffle*, 494 U.S. at 494-95 (citing *Teague*, 489 U.S. at 311).

For these reasons, I believe that the presumption in favor of the *sua sponte* application of *Teague* should apply in the instant case. Once raised, I concur with Judge Clay's conclusion in Part II.B. that retroactive application of the new constitutional rule Lyons proposes is barred by *Teague*.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. I respectfully dissent from the majority's decision to apply *Teague v. Lane*, 489 U.S. 288 (1989), despite the state's forfeiture of that defense. Because evidence used at Lyons's trial violated the presumption of innocence and because the prosecutor infringed on Lyons's Fourth Amendment rights, I would affirm the district court's decision to issue a writ of habeas corpus.

I agree with Judge Gilman that *Goeke v. Branch*, 514 U.S. 115 (1995), does not require us to apply *Teague* in this case because the state failed to raise this defense in the district court.[1] Our view that a state forfeits its *Teague* defense if it

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[1] As Judge Gilman points out, *Goeke* has no bearing on the outcome in this case because, in *Goeke*, the state preserved its *Teague* defense by raising it in the district court. The state in the present case forfeited its *Teague* defense when it failed to raise the defense in the district court. *See Sinistaj v. Burt*, 66 F.3d 804, 805 n. 1 (6th Cir. 1995) (explaining that the state forfeited *Teague* because it did not raise the defense in the district court even though it later raised it in a motion to amend the district court's judgment).

does not raise it in the district court is therefore the holding of the court on this point.

I also agree with Judge Gilman that, although we are not required to invoke *Teague* when a state has forfeited it, we may exercise our discretion to invoke the defense sua sponte. *See Caspari v. Bohlen,* 510 U.S. 383, 389 (1994); *Schiro v. Farley,* 510 U.S. 222, 227 (1994). I disagree, however, that a federal court should presumptively invoke the defense sua sponte. I believe that, when a state has failed to raise its *Teague* defense, a federal court should not invoke the defense sua sponte unless there are particularly strong reasons to overlook the state's forfeiture.

Although the Supreme Court has yet to provide much guidance on when we should exercise our discretion to invoke *Teague* sua sponte, this court has had the opportunity to address the issue, and in each instance where the state has failed to raise *Teague* in the district court, we have declined to invoke the defense on our own. *See Coe v. Bell,* 161 F.3d 320, 337 n. 1, 339 n.3 (6th Cir. 1998), *petition for cert. filed,* No. 98-9606 (May 24, 1999); *Sinistaj v. Burt,* 66 F.3d 804, 805 n.1 (6th Cir. 1995); *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1104 n.4 (6th Cir.) (en banc), *cert. denied,* 499 U.S. 970 (1991). The fact that we have declined to invoke *Teague* when a state forfeits it indicates that we should not exercise our discretion to invoke *Teague* unless there are strong reasons to do so.

As a starting point, I would presume that the state, like any other litigant, loses a defense it fails to raise. This presumption is consistent with our general approach to waivers of claims and defenses in civil litigation, and it is

consistent with our strict enforcement of the procedural requirements imposed on criminal defendants and habeas petitioners. *See* 2 James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure § 22.1, at 856 (3d ed. 1998) (arguing that state attorneys "at the least should be held to procedural standards that are no less exacting than those applied to *pro se* prisoners"). Although holding the state to its *Teague* waiver might be viewed as having the effect of "excusing" the petitioner's earlier procedural errors, this outcome does not constitute a "double standard." When a plaintiff makes a procedural error -- say, filing a claim after the limitations period has passed -- that is subject to an affirmative defense, the defendant must raise the defense in order to preserve it. Failure to do so will "excuse" the late filing. The result I argue for here is directly analogous and is thus no more bizarre than the normal operation of the rules of civil litigation.

Judge Clay argues in favor of the opposite presumption in part by pointing to provisions of AEDPA. He points out AEDPA's rule that exhaustion issues are preserved unless expressly waived and that the new statute adopted much of *Teague,* concluding that the trend is to apply *Teague* and that states should not generally lose defenses they fail to raise. *See ante* at 29 n. 12, 30 n. 13. As an initial matter, given that AEDPA is not retroactive, *see Lindh v. Murphy,* 521 U.S. 320 (1997), I do not think it should be made retroactive simply by labeling its provisions a "trend." Moreover, Congress's adoption of *Teague's* retroactivity principles does not strike me as affecting the parties' pleading burdens, and its clear alteration of the pleading requirements for the exhaustion defense suggests, if anything, that Congress was content with prior law permitting implied *Teague*

waivers. *See* Liebman & Hertz § 22.1, at 852 ("Given that Congress is presumed to be aware of existing caselaw, the congressional choice to limit this requirement of an express waiver to the nonexhaustion defense signals Congress' desire to maintain the practice of finding waiver by default with respect to *other* state defenses. The circuit courts that have considered the issue thus far generally have concluded that the defenses that AEDPA creates (apart from the exhaustion defense) are waiveable, including by default.") (footnotes omitted).

While I begin with this presumption that defenses not raised are forfeited, I recognize our discretion to raise *Teague* sua sponte and have looked for reasons to do so in this case. Beyond the general considerations underlying *Teague* itself, however, I have not identified any factors particular to this case that make sua sponte application of *Teague* appropriate.

Courts applying *Teague* when the state has not preserved it often refer generally to the interests of federalism, comity, and finality. *See, e.g., Fisher v. Texas,* 169 F.3d 295, 305 (5th Cir. 1999) ("In the interests of finality and judicial economy, we choose to exercise our discretion and consider whether Fisher's claim is barred."); *Curtis v. Duval,* 124 F.3d 1, 5 (lst Cir. 1997) (stating that "comity and orderly procedure loom large"); *Jones v. Page,* 76 F.3d 831, 850 (7th Cir.), *cert. denied,* 519 U.S. 951 (1996), (approving application of *Teague* "out of respect for 'the important policies underlying the finality of state court criminal judgments, [and] non-retroactivity principles'") (quoting district court). Judge Gilman also refers to these interests in explaining his presumption in favor of applying *Teague.* I find it unsatisfactory to rely entirely on these general policies.

In my view, the importance of the policies behind *Teague* is the reason we even *consider* applying *Teague* once the state has waived it.

Two other courts of appeals have tried to guide the discretionary decision to apply *Teague* by adapting the *Granberry v. Greer,* 481 U.S. 129 (1987), test to this context. *See Winsett v. Washington,* 130 F.3d 269, 274 (7th Cir. 1997); *Boardman v. Estelle,* 957 F.2d 1523, 1534-37 (9th Cir.), *cert. denied,* 506 U.S. 904 (1992). Unfortunately, some of the *Granberry* factors do not make much sense in the *Teague* context. Factors such as finality and federalism will generally weigh in favor of applying *Teague* but can cut either way with respect to exhaustion. The procedural exhaustion context is special because it governs *when,* not *whether,* the federal court will reach the merits of the petition. The *Granberry* factors are therefore not necessarily the most important considerations for deciding when *Teague* should be invoked sua sponte.

One overriding consideration in *Granberry* -- the interests of justice -- is more easily transferred to the *Teague* context. The interests of justice may include actual innocence, whether the proper resolution of the merits of the claim is clear, and whether the district court granted habeas relief. *See Granberry,* 481 U.S. at 135-36; *Boardman,* 957 F.2d at 1537. The last of these is relevant for the reason discussed above, that it appears particularly unfair for the court of appeals to apply *Teague* once another federal court has declared that a constitutional violation occurred. In addition, "comity also calls for representatives of states not to agree to federal courts expending substantial time in addressing the merits of a case, only to argue belatedly that

the merits should not have been reached." *Agard v. Portuondo,* 159 F.3d 98, 100 (2d Cir. 1998) (decision on rehearing), *cert. granted,* --- U.S. ---, 119 S. Ct. 1248 (1999). In this case, these factors weigh against sua sponte application of Teague.

Many factors logically may bear on whether we should consider *Teague* in a particular case after it has been waived.[2] Here, the interests of federalism and comity are not different or more weighty than in the usual *Teague-waiver* case. Both a magistrate judge and a district judge have declared that Lyons's conviction was obtained in violation of the Constitution. Under these circumstances, the appearance of justice is compromised when the court of appeals steps into the role of the state's attorney, raising a defense the state has waived in order to bar relief.

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[2] In addition to the factors already mentioned, courts have treated the failure to raise a retroactivity defense as excusable neglect when *Teague* itself was new, *see, e.g., Hopkinson v. Shillinger,* 888 F.2d 1286, 1288-91 (10th Cir. 1989), *cert. denied,* 497 U.S. 1010 (1990), or when the state reasonably believed that the petitioner did not seek the benefit of a new rule, *see Thomas v. Gilmore,* 144 F.3d 513, 516 (7th Cir. 1998), *cert. denied,* --- U.S. ---, 119 S.Ct. 907 (1999). Courts have also refused to raise *Teague* after granting discretionary review -- such as certiorari or rehearing en banc -- for the purpose of considering a substantive issue. *See Schiro v. Farley,* 510 U.S. 222, 228-29 (1994); *Eaglin v. Welborn,* 57 F.3d 496, 498-99 (7th Cir.) (en banc), *cert. denied,* 516 U.S. 965 (1995); *but see Caspari v. Bohlen,* 510 U.S. 383, 388-90 (1994) (holding that the *Teague* question was fairly included in the substantive question on which certiorari was granted).

Because the *Teague* issue is dispositive of this case, there is no reason to address any other potential issues. To the extent that any opinions do so they offer only personal observations of the authoring judge.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

[Filed July 31, 1997]

No. 95-CV-60304-AA

THEODORE LYONS
Petitioner,

v.

CLARICE STOVALL,
Respondent.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, AND GRANTING PETITION FOR WRIT OF HABEAS CORPUS

On May 14, 1997, Magistrate Judge Marc L. Goldman recommended that the above-captioned petition for writ of habeas corpus be granted. The court has reviewed the file, record, and magistrate judge's report and recommendation. Objections to the report have been filed within the established time period and have also been considered. After careful consideration,

IT IS ORDERED that the magistrate judge's report and recommendation dated May 14, 1997, hereby is ACCEPTED as the findings and conclusions of this court.

IT IS FURTHER ORDERED that Theodore Lyons's petition for writ of habeas corpus hereby is GRANTED for the reasons well-developed in the magistrate judge's report and recommendation. This case shall be returned to the state forum for a new trial within 180 days.

/s/_____
BARBARA K. HACKETT
United States District Judge

Dated: July 30, 1997.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

[Filed May 16, 1997]

No. 95-CV-60304-AA

THEODORE LYONS,
Petitioner,

v.

CLARICE STOVALL,
Respondent.

REPORT AND RECOMMENDATION

This is a petition for writ of habeas corpus brought pursuant to 28 U.S.C. §2254. Petitioner, Theodore Lyons, was convicted on August 20, 1987, following a jury trial in the Wayne County, Michigan Circuit Court, of Criminal Sexual Conduct in the First Degree. MCL 750.520b(1) (h) (ii) . Petitioner was subsequently sentenced to a term of ten to twenty-five years imprisonment by Judge Thomas Jackson. He is currently incarcerated in the Mound Correctional Facility in Detroit, Michigan.

The facts giving rise to this offense are as follows. In March, 1983, petitioner was hired as an employee and assistant manager at the Hull Road Community Living Facility in Belleville, Michigan. The facility is a live-in facility for the mentally retarded and is utilized by the Michigan Department of Mental Health as a contract care provider.

Evangeline McKenzie, the victim in this case, entered the facility on June 22, 1983. She had previously been hospitalized at the Plymouth Center for Human Development. McKenzie was described as being in her early 20s and "profoundly retarded". According to John Orr, a psychologist with the Wayne County Live-In Center, Ms. McKenzie could not talk, walked with a gait, could not feed or bathe herself, or use the bathroom unassisted. Her IQ was described as being below 20.

At the time that Evangeline entered the Hull Road home, there were six adult developmentally disabled clients and nine full-time and one part-time staff members. Five of the staff members were male; the rest were female. Petitioner was a shift supervisor and provided direct care to the clients. As a direct care worker, petitioner assisted in the feeding of the clients, provided bathroom assistance, and assisted clients in their general personal care. According to the testimony of staff members, none of the clients at the facility were sexually active and no birth control was provided to them.

In November, 1983, Dr. Mindy Smith conducted a general physical examination of Evangeline. She described Evangeline as being incapable of speech or independent movement. She noted that Evangeline suffered from a vaginal

infection. In December, 1983, Dr. Smith was asked to examine Evangeline again due to some changes in her behavior, including some beating on her abdomen. At that time, Dr. Smith diagnosed Evangeline as being pregnant. Records show Evangeline's last menstrual period to have been on July 16, 1983 and after additional testing, including ultrasound, it was determined that as of December 8, 1983, Evangeline was 20.5 weeks pregnant. Dr. Smith testified that she believed that Evangeline had become pregnant sometime within two weeks after July 16, 1983. Dr. Smith also testified that she was familiar with records that indicated that a Dr. Morley, who examined Evangeline sometime later than December, 1983, concluded that as of December 16, 1983, Evangeline was 24 or 25 weeks pregnant.

Dr. Karen Bartscht examined Evangeline on February 15, 1984. At that time, Dr. Bartscht estimated that Evangeline was a few days over 30 weeks pregnant. This was based on the various physical exams given Evangeline over the previous months and the heart tones of the fetus.

Evangeline McKenzie gave birth to a child on March 24, 1984. The child was given the name Jonathan McKenzie. Dr. Bartscht drew blood from both the child and Evangeline at the time of delivery, which was sent to the state police crime laboratory. Dr. Bartscht testified that the baby was premature and that he was born at 36 weeks. She believed that conception would have taken place between June 15 and June 25, 1983.

Blood samples were taken from two male residents of the home, five male direct care providers other than petitioner, as well as from the director of the agency. In all,

eight men other than petitioner were tested. Polygraph tests were also apparently given. All male employees other than petitioner were excluded as a possible father of the child. Petitioner's blood was drawn on July 30, 1984, pursuant to a search warrant. Petitioner's blood sample, along with that of the mother and baby, were sent to the National Legal Laboratory where human leukocyte antigen (HLA) tests revealed that his blood contained genetic markers which matched markers found in Jonathan McKenzie's blood. Based upon these findings, petitioner was charged with criminal sexual conduct in the first degree.

In addition to the evidence described above outlining the events and petitioner's access to Evangeline, at trial the state introduced, over defense counsel's objection, the testimony of two experts to interpret the HLA test results: Dr. Richard Walker, an M.D. employed as a clinical pathologist at Beaumont Hospital in Royal Oak, Michigan; and Dr. Henry Gershowitz, Ph.D., a professor of human genetics at the University of Michigan. Both witnesses testified that HLA testing was utilized extensively at that time in paternity testing. Both also stressed that a paternity test is an exclusionary test, one designed to rule out men falsely accused of paternity. Both agreed that no test could absolutely establish that a man is the father of a particular child. Dr. Walker testified that the tests could exclude 98% of the men that are falsely accused of paternity. Dr. Gershowitz testified that his test would eliminate 96.1% of falsely accused men.[1]

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[1] This figure, called the prior probability of exclusion, gives the probability that the tests employed will exclude a falsely

Both experts stated that if upon review of the HLA test results, a particular person cannot be excluded as the father of the child, they could arrive at an index of paternity, that being a numerical estimate or odds ratio that a cross between the putative father and the mother would produce an offspring with the child's phenotypes and the corresponding probability for a random selection of genes from the male population. See, County of El Dorado v. Misura, 33 Cal. App. 4th at 79, 38 Cal. Rptr. at 911, quoting from Kaye, "Plemel as a Primer on Proving Paternity," 24 Willamette L. Rev. 867, 877 (1988). In this case, Dr. Walker arrived at a paternity index[2] of 429 to 1 after testing only the blood of petitioner and the child. He testified that the number meant that the probability

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accused man. County of El Dorado v. Misura, 33 Cal. App.4th 73, 79, 38 Cal. Rptr. 908, 911 (1995). The figure does not give the probability that the alleged father is the true father. Indeed there is no correlation between the probability of exclusion and the likelihood of paternity. Rather, it is a starting point for determining the likelihood of paternity based upon other empirical evidence. Id.

[2]This index similarly does not give the probability that the accused is the father. See, Plemel v. Walter, 303 Or. 262, 735 P.2d 1209, 1213 (1987). The probability of paternity is derived by converting the paternity index into a percentage. Plemel, 735 P.2d at 1214; Misura, 33 Cal. App. 4th at 79. It is a caparison between the probability that the putative father transmitted the necessary genes to the child with the statistical incidence of the genes in the general population. Blakesly, "Scientific Testing & Proof of Paternity", 57 LA. L. Rev. 379, 388 (1997).

or odds was 429 to 1 that a man with a blood type of petitioner could be the father of Jonathan McKenzie.[3]

The prosecutor then asked Dr. Walker to convert this index into a percentage ratio called the probability of paternity. Without any explanation of the manner in which he was making this calculation, Dr. Walker testified that considering the blood factors of the father, mother and child, the probability was greater than 99 percent that a man with the blood type of petitioner was the father of a child with the blood type of Jonathan McKenzie. Considering the factors of the child and petitioner alone, the probability was 97.46% that a man of petitioner's blood type could father a child with Jonathan's blood type.

Dr. Gershowitz also testified that the test results showed that Lyons could not be excluded as the father of Jonathan McKenzie. He then came up with a combined paternity-index of 303.8, which he defined as an odds statement that this man is the father of the child compared to any other man in the population who might be able to contribute the requisite genes. Based on that index, Dr. Gershowitz concluded that petitioner was 304 times more likely to be the father of Jonathan than any other random man. Converting that figure into a percentage, again without any explanation of the scientific, statistical, or mathematical basis for the calculation, Dr. Gershowitz stated that the relative

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[3] It does not appear that Dr. Walker's testimony on this issue was accurate, with a paternity index of 429, petitioner was 429 times more likely than a randomly-selected man to have fathered a child with Jonathan McKenzie's phenotypes.

probability of paternity compared to any other man was 99.7 percent.

In his closing argument, the prosecution used these figures to argue the guilt of petitioner. He contended that Dr. Gershowitz was 99.7% sure that petitioner was the father of Jonathan and that Dr. Walker was 99.76% sure that petitioner was the father. He went on to argue that these figures met the government's burden of establishing guilt beyond a reasonable doubt.

The petitioner testified in his own behalf and denied any sexual contact with Evangeline McKenzie. During cross-examination, in response to the prosecutor's questions, he persisted in his claim of innocence. However, after one such denial of guilt, the prosecutor asked:

> "I understand your defense perfectly, sir, but if you're the innocent man that you claim to be, why did the police have to get a search warrant and Court order to get your blood?"

Defense counsel objected to this question on the basis that it was a comment on petitioner's exercise of his constitutional right not to have his blood drawn without a court order. The trial court sustained the objection. After a discussion outside the presence of the jury and after permitting the prosecution to complete his cross-examination, the court gave the following cautionary instruction:

> I want to state to the jury that prior to my excusing you earlier there was a question and objection made that I sustained the objection

> on that. So that is stricken from your consideration.

As noted, petitioner was convicted by the jury of criminal sexual conduct in the first degree and sentenced to a term of ten to twenty-five years imprisonment. Petitioner filed an appeal as of right in the Michigan Court of Appeals. Among the issues raised in that appeal were the two issues raised here. In an unpublished decision dated April 13, 1994, the Court of Appeals affirmed the conviction. People v. Lyons, No. 147006. Petitioner's application for leave to appeal to the Michigan Supreme Court was denied on January, 31, 1995. A motion for reconsideration was denied on April 28, 1995.

Petitioner filed this petition for writ of habeas corpus on July 28, 1995. In his petition, he claims the following:

> 1. Petitioner's rights to the presumption of innocence and to trial by jury were eviscerated because of the introduction of highly prejudicial testimony and argument regarding the purported statistical probability of petitioner's paternity.
>
> 2. Petitioner's rights under the fourth, fifth, sixth and fourteenth amendments were violated because of the prosecutor's cross-examination which suggested that petitioner was guilty because the police were required to seek a search warrant to obtain his blood.

The state has filed a response to the petition. It is uncontested that the issues presented have been exhausted and the matter is now ready for decision.

II.

The argument put forward by petitioner in support of his first claim combines issues of mathematics, statistics, probability theory and their intersection with the law. Petitioner does not claim that it was error to allow the experts to testify concerning either the probability of exclusion or the paternity index, both of which are exclusionary results. Rather, petitioner claims that the error in this case arose from the doctors' conversion of the paternity index into a percentage stating the probability of petitioner's paternity, which is an inclusionary statistic, that being the probability that the putative father is the biological father of the child. The claim of error is based upon the statistical construct that was utilized to convert the paternity index into the percentage figure. That construct is known as Bayes' Theorem.

Bayes' Theorem[4] is a formula which tells "a rational decisionmaker how newly discovered evidence should change a prior probability that a hypothesis is true." Peterson, "A Few Things You Should Know About Paternity Tests", 22 Santa Clara L. Rev. 667, 681 (1982). It is used for the purpose of "showing the effect of . . . new statistical evidence on a previously predicted probability." I. Ellman &

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[4] The probability theorem was developed by Thomas Bayes, an 18th Century Presbyterian English minister. Blakesly, 57 La. L. Rev. at 387.

D. Kaye, "Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?" 54 N.Y.U. L. Rev. 1131, 1141 (1979). See, State v. Skipper, 228 Conn. 610, 637 A.2d 1101 (1994). As applied to HLA testing for paternity, Bayes' Theorem tells how a prior probability of paternity is effected by new evidence, ordinarily the paternity index. The theorem postulates the multiplication of the paternity index by an assumed percentage of a prior probability of paternity in order to obtain a new probability of paternity. Skipper, 637 A.2d at 1104. However, Bayes' Theorem does not provide or define the prior probability; it is necessary to assume the prior probability. Id.; see also, State v. Spann, 236 N.J.Super. 85, 563 A.2d 1145, 1150 (1989); State v. Hartman, 145 Wis.2d 1, 426 N.W. 2d 320, 324 (1988). Ordinarily, a 50 percent prior probability of paternity is employed to calculate the new probability of paternity. Spann, 563 A.2d at 1150; Hartman, 426 N.W.2d at 324. This means that it is assumed that there is a 50 percent probability that the defendant is the father and a fifty percent probability that a randomly selected man is the father. Id. In other words, as noted above, at least in paternity cases, Bayes' Theorem is utilized in a manner that assumes that it is just as likely as not that the putative father had intercourse with the mother during the relevant period of conception. State v. Spann, 236 N.J. Super. at 23-24.

Petitioner claims that the introduction of evidence of the "percentage of probability" that he was father of the child violated his constitutional rights. More specifically, petitioner claims that the use of the fifty percent prior probability that he is the father of the child necessarily includes the assumption of a fifty percent probability that he had intercourse with the mother. He claims that the use of this assumption in calculating the probability of paternity eviscerates the

presumption of innocence and results in a denial of due process.

It is beyond question that under our criminal justice system, the prosecution must establish every fact necessary to prove the elements of a crime beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364 (1970). The presumption of innocence is equally fundamental to our criminal justice system. As stated in Estelle v. Williams, 425 U.S. 501, 503 (1976):

> The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:
>
> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895).
>
> To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must

> carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 375 (1970).

Accordingly, if the method of converting the paternity index into the probability of paternity is based upon mathematical or statistical principles which undermine or eviscerate the presumption of innocence, petitioner's conviction may have been obtained in violation of his constitutional rights.

There are no federal cases which have addressed the issue presented here. However, four state courts have considered the issue of whether the use of Bayes' Theorem to compute the probability of paternity in a sexual assault case violates the presumption of innocence. All four courts have held that it does.[5]

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[5] All of the cases which will be discussed involve criminal prosecutions for sexual assault in which the victim subsequently had a child whose blood could be drawn and whose genetic markers could be analyzed through HLA testing and compared with that of the defendant. Some courts have held that testimony concerning the probability of paternity using Bayes' Theorem is admissible in a civil paternity action. See Hartman v. Stassis, 504 N.W. 129, 132-33 (Iowa Ct. of Appeals, 1993); Kofford v. Flora, 744 P.2d 1343, 1348-49 (Utah 1987); Commonwealth v. Beausoleil, 397 Mass. 206, 490 N.E.2d 788 (1986). However, even those courts which have held that the statistical probability of paternity is admissible in a civil paternity proceeding have put strict limitations on its admission, including the requirement that the factfinder be carefully and completely advised concerning the assumptions

In State v. Hartman, 145 Wis.2d 1, 426 N.W.2d 320 (1988), the court considered a case similar to this one in that the probability of exclusion, the paternity index and the probability of paternity were all admitted into evidence over the defendant's objections. The court found that the probability of exclusion and the paternity index were relevant to the determination of the identity of the perpetrator of the sexual assault when those statistics include the defendant as a possible father of the child. 426 N.W.2d at 325. The court found, however, that a defendant's probability of paternity would not be admissible because, through the use of Bayes' Theorem, it assumes facts as a condition of its calculation. The court stated:

> As we noted earlier, the calculation of a defendant's probability of paternity is typically based upon a 50 percent prior probability which arbitrarily assumes a 50 percent likelihood that the defendant is the father, and a 50 percent likelihood that a randomly selected man is the father. In other words, the probability of paternity is calculated based upon the assumption "that the mother and putative father have engaged in sexual intercourse at least once during the period of possible conception" In Re Paternity of M.J.B., 144 Wis.2d. 638, 650, 425 N.W.2d

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underlying the conclusions and how belief or disbelief of those assumptions might affect the calculation of the probability of paternity. Kofford, 744 P.2d at 1352; Beausoliel, 490 N.E.2d at 795-97.

> 404 (1988). Because the probability of paternity assumes that sexual intercourse has occurred, it is improper to use this statistic to prove that sexual intercourse has occurred.

426 N.W.2d at 326. The Court went on to state:

> . . . . it is antithetical to our system of criminal justice to allow the state, through the use of statistical evidence which assumes that the defendant committed the crime, to prove that the defendant committed the crime. Id.

In State v. Boyd, 331 N.W. 2d 480 (Minn. 1983), the complainant, a young girl under the age of sixteen years, gave birth to a baby. She accused the defendant of fathering the baby and he was charged with criminal sexual conduct in the third degree. Minn. Stat. §609.344.[6] Blood samples were taken from the baby and the defendant. Experts who analyzed the samples found that the tests would exclude between 94% and 97% of the men tested. They further concluded that 1,121 unrelated men would have to be randomly sampled before another man would be found with the appropriate genes to father the child in question. They then converted this index of 1,121 to a percentage [99.911%] to determine the likelihood of paternity. Boyd moved to suppress the evidence of the likelihood of paternity asserting that it was inadmissible

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[6] This section addresses sexual penetration of a person between the ages of 13 and 16 by a person more than 24 months older.

evidence of statistical probability. He further claimed that it was based on the assumption that he had sexually penetrated the complainant, which was the ultimate issue in the case. The trial court granted the motion to suppress and the prosecution appealed.

The Minnesota Supreme Court affirmed the trial court's decision. Relying on State v. Carlson, 267 N.W.2d 170 (Minn. 1978), the court held that it was error to express these figures in statistical terms. The court noted that their concern was not the adequacy of the foundation, but ". . . the potentially exaggerated impact on the trier of fact." Boyd, 331 N.W.2d at 482. The court stated that testimony expressing opinions in conclusions on statistical probabilities can suggest, by quantification, the satisfaction of the requirement that guilt be proven beyond a reasonable doubt. Id.; see Tribe, "Trial by Mathematics", 84 Harv. L. Rev 1329 (1971). Based upon the other evidence in the case, however, the court found the error to be harmless.[7]

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[7] In State v. Kim, 398 N.W.2d 544 (Minn. Sup. Ct. 1987), a rape case which did not result in a pregnancy, the Supreme Court of Minnesota again held, on an interlocutory appeal by the state, that the trial court had been correct in excluding expert testimony which, based on semen samples taken from the victim and the defendant, revealed that 96.4 percent of the males in the Twin Cities area could be excluded as the assailant. The court, relying on State v. Boyd, found that there existed a significant danger that the jury would use the evidence as a measure of the probability of the defendant's guilt or innocence and "thereby undermine the presumption of innocence, erode the values served by the reasonable doubt standard, and dehumanize our system of justice." Kim, 398 N.W.2d at 547 (quoting from Boyd, 262

In State v Spann, 236 N.J. Super. 13, 563 A.2d 1145 (1989) the defendant, a prison guard, was charged with sexually assaulting a female inmate. The inmate became pregnant and had a child. HLA testing was performed on the defendant and the child, which failed to exclude Spann as the father. At trial, a geneticist was permitted to testify as to the probability of exclusion, the paternity index, and the probability of paternity. The defendant was found guilty of sexual assault and appealed on the basis that it was error to allow testimony concerning the probability of paternity because it was based upon an "illegal assumption". Id. at 1148.[8]

The Spann court recognized that HLA testing was regularly used and accepted in a civil trial as an aid to establishing paternity. However, it further noted that this was the first time that such evidence had been used in New Jersey to corroborate a victim's claim that a defendant had sexually assaulted her. After explaining the basis of HLA testing and the use of Bayes' Theorem to convert the paternity index into the probability of paternity, the court held that the probability of paternity is inadmissible in a criminal case where the defendant is charged with a sexual assault and the victim is alleged to have conceived a child as a result of that assault. Id. at 1152.

F.W.2d at 483).

[8] The court noted that the defendant was not contesting the trial court's ruling that HLA test results were admissible in a criminal case.

Relying on State v. Hartman, the Spann court found that because the probability of paternity assumes as a condition of its calculation that there is a fifty-fifty prior probability of paternity, which assumes that the victim and the defendant had intercourse at least once during the period of conception, it is improper to use the statistic to prove that intercourse has occurred. 563 A.2d at 1152. The court also noted the distinction between use of this statistic in a civil case and a criminal case:

> Additionally, in a paternity case, where the ultimate issue is paternity and not merely the occurrence of sexual intercourse, the factfinder is typically informed that it must disregard the probability of paternity statistic if it finds that the putative father did not have sexual intercourse with the mother during the period of conception. See, e.g., Com. v. Beausoleil, 397 Mass. 206, 490 N.E.2d 788, 797 n. 18 (Sup. Ct.1986); Kofford v. Flora, supra. 744 P.2d at 1352. In a criminal sexual assault case such as the one before us, however, the ultimate issue is the occurrence of intercourse between the mother and the putative father/defendant. Here, once the factfinder has made the threshold determination as to the occurrence of intercourse, the ultimate issue has been determined and the inquiry is at an end. Thus, the probability of paternity statistic in this context is irrelevant.

562 A.2d at 1152.

In State v. Skipper, the Connecticut Supreme Court reversed a defendant's conviction for sexual assault because the use of Bayes' Theorem permitted the introduction of a probability of paternity based upon a fifty-fifty assumption that sexual intercourse had occurred. The court found that use of a fifty-fifty assumption of sexual intercourse in order to prove sexual intercourse violated the presumption of innocence. The court stated:

> Without first assuming a prior probability of paternity, i.e., guilt, Bayes' Theorem cannot be applied, and the probability of paternity cannot be computed in sexual assault cases. R. Jonakait, "When Blood Is Their Argument: Probabilities in Criminal Cases, Genetic Markers, and, Once Again, Bayes' Theorem," 1983 U. Ill. L. Rev. 369, 403 (1983). Because Bayes' Theorem requires the assumption of a prior probability of paternity, i.e., guilt, its use is inconsistent with the presumption of innocence in a criminal case such as this, in which Bayes' Theorem was used to establish the probability of paternity, i.e., that the defendant was the father of the product of conception of an alleged sexual assault. See id., pp. 406-408. Whether a prior probability of 50 percent is automatically used or whether the jury is instructed to adopt its own prior probability, when the probability of paternity statistic is introduced, an assumption is required to be made by the jury before it has heard all of the evidence – that there is a quantifiable probability that the

> defendant committed the crime. In fact, if the presumption of innocence were factored into Bayes' Theorem, the probability of paternity statistic would be useless. If we assume that the presumption of innocence standard would require the prior probability of guilt to be zero, the probability of paternity in a criminal case would always be zero because Bayes' Theorem requires the paternity index to be multiplied by a positive prior probability in order to have any utility. Id., 406. "In other words, Bayes' Theorem can only work if the presumption of innocence disappears from consideration." Id., 408.

637 A2d at 1108.

Thus, all of the cases which have analyzed the use of the probability of paternity statistic in criminal sexual assault trials have concluded that because its calculation assumes a fifty-fifty likelihood of sexual intercourse between the victim and the defendant, its use to prove sexual intercourse violates the presumption of innocence.[9] I agree with the result reached

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[9] These conclusions are not without both support and criticism on the part of legal scholars and statisticians. In an interesting Internet exchange among a group of law professors and statisticians following the Skipper decision (this exchange was subsequently published as an article entitled "Probability and Proof" in State v. Skipper: An Internet Exchange, 35 Jurimetrics J. 277 (1995)), a variety of opinions were put forth concerning the use of probabilities in the courtroom for understanding legal proofs. Although the article can simply be viewed as ruminations among a

group of well respected academics, one very important issue is raised, that being a jury's ability to comprehend and properly utilize the information. Professor Richard Friedman of the University of Michigan Law School postulated that when statistical evidence is the key evidence in the case, as it was here, there is a strong likelihood that the jury may use the statistical evidence quite poorly. In doing so, Friedman relied on D. Kahneman, P. Slovic & A. Tversky, "Judgement Under Uncertainty: Heuristics and Biases" (1982). Applying the paternity index in this case rather than that from Skipper as Friedman did, Friedman suggests that when a jury hears that only one of three hundred eight men could have fathered a child with the genetic markers of Jonathon, on one extreme the jury might say that the probability of innocence is only 1 in 308. On the other extreme, the jury could postulate that if 1 in 308 people have this genetic type, there must be thousands of people in the community that could have fathered the child. Both conclusions would be fallacious. Friedman suggests that the jury must be given some help in understanding the significance of the ratio, including the probability of the evidence given the truth of the hypothesis and the probability of the evidence given the falsity of the hypothesis. Id. at 284. See also McCormick on Evidence, §211, p.398 (4th Ed. West 1992).

Roger Park, Professor of Law at the University of Minnesota, suggested that the problem in Skipper was the failure of the expert to testify to a probability of paternity without revealing that it was based upon a 50 percent prior probability of sexual intercourse. Professor Park believed that if the information was presented in another form, a court might find it admissible. See also, Blakesley, 57 La. L. Rev. at 387.

The upshot of this lengthy discussion reveals that Bayesian Theory is simply an analytical tool for evaluating probabilities and inferences and is of questionable value in decision making without

in these cases and conclude that here, too, the introduction of evidence relating to the probability of paternity deprived petitioner of a fair trial. The computation of the probability of paternity to prove sexual intercourse, utilizing the assumption that there is a fifty-fifty probability of intercourse violates the presumption of innocence because it assumes guilt of the crime with which the defendant is charged. As such it relieves the prosecution of its duty to establish the guilt of the defendant beyond a reasonable doubt. While I do not necessarily agree with the Skipper court that the presumption of innocence standard requires that the prior probability of intercourse be deemed to be zero, I do believe that the reasonable doubt standard requires that the prior probability of paternity be deemed something less than the fifty percent that was used in this case. Regardless of what that number should be, I conclude, as these other courts have, that a jury may not be allowed to make a finding that sexual intercourse has occurred based upon statistical evidence that assumes that there was intercourse.

This is not to say that such evidence may not, in some circumstances be admissible. As noted in footnote 8, if the jury were to be informed of the assumptions underlying the calculation of the prior probability of paternity, and if they were permitted, based upon the evidence presented to them and with proper instruction, to arrive at their own figure for the prior probability of paternity, such evidence might be

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a thorough explanation of the concepts underlying it. See also, United States v. Shonubi, 895 F. Supp 460, 484-486 (S.D.N.Y. 1995) .

admissible, even in a criminal case. See County of El Dorado v. Misura, 33 Cal App. 4th at 80; Plemel v Walter, 735 P.2d at 1219; Koffard v. Flora, 744 P.2d at 1354.[10] See also McCormick on Evidence, §211, p.388 (West 1992).

However, in this case, neither of the two experts' testimony nor the court's instructions gave the jury any guidelines for evaluating this evidence. Rather the only guideline given was the prosecutor's closing argument, in which he mischaracterized the meaning of the evidence and the weight that should have been afforded the evidence by arguing that the 99.7% probability of paternity as computed by the experts met his burden of establishing guilt beyond a reasonable doubt. The admission of this evidence in its unexplained form and its subsequent use by the state exemplified all that is wrong with the use of statistical evidence in a legal proceeding. It oversimplifies complex computations, exaggerates their impact, and results in an erroneous quantification of the state's burden to prove guilt beyond a reasonable doubt.

I therefore find that the introduction of the probability of paternity in a percentage form clearly undermined the presumption of innocence and relieved the state of its burden of proving guilt beyond a reasonable doubt. It was clearly erroneous to admit such evidence. However, the next

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[10] It should be noted that this approach was rejected by the court in Skipper, 228 Conn. at 623, n.18. See also L. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process", 84 Harv.. L. Rev. 1329, 1368-75 (1971). However, the Spann court concluded that such an approach might solve the problem presented. 130 N.J. at 518.

erroneous to admit such evidence. However, the next question to be resolved is whether the error was harmless. That issue will be discussed in Part IV of this report.

III.

Petitioner also contends that a writ of habeas corpus should issue because his constitutional rights under the fourth, fifth, sixth and fourteenth amendments were violated by the improper comment the prosecutor made during cross-examination of petitioner. During cross-examination, the following exchange took place:

> Q. Well, since you told the jury you couldn't possibly have done it, you must have been outraged that they would even think about you as a suspect in this case?
>
> A. Yes, I was upset considering I had been reassured repeatedly by the detective in charge that I wasn't a suspect.
>
> Q. But then they did the blood test, right?
>
> A. Yes, they did.
>
> Q. Okay. You're an innocent man, right?
>
> A. I'm innocent of this charge, yes.
>
> Q. That's all we're talking about. We're not talking about other things you may have

> done, just this particular crime we have charged against you.
>
> A. I'm not guilty of the charge. I had nothing to do with it.
>
> Q. I understand your defense perfectly, sir, but if you're the innocent man that you claim to be, why did the police have to get a search warrant and Court order to get your blood?

(TR August 20, 1987 p.72) .

Defense counsel immediately objected, whereupon the jury was excused. Outside the jury's presence, the prosecutor explained that he believed that it was not violative of petitioners fifth amendment rights to ask why he did not voluntarily submit blood samples.[11] He also suggested that it "circumstantially shows that consciousness of guilt." Defense counsel argued that petitioner had no legal obligation to voluntarily provide blood samples and that the prosecutor was attempting to infer guilt because petitioner exercised his constitutional right. Defense counsel also requested a cautionary instruction be given to the jury. The court sustained the objection. After a 20-minute recess, the jury was seated and the prosecutor continued his cross-examination. At the conclusion of the cross-examination, the trial judge gave the following instruction:

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[11] The prosecutor cited Schmerber v. California, 384 U.S. 757 (1966).

> I want to state to the jury just prior to my excusing you earlier, there was a question and objection made that I sustained the objection on that. So that is stricken from your consideration.

(id. P. 85).

Petitioner characterizes this question as prosecutorial misconduct of constitutional dimension. On habeas review, the court's role is to determine whether the prosecutorial misconduct "was so egregious as to render the entire trial fundamentally unfair." Serra v. Michigan Dep't of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993) (citing Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir.), cert. denied, 444 U.S. 936 (1979)), cert. denied, 510 U.S. 1201 (1994). However, where, as here, a petitioner contends that the prosecutor's comment causes the deprivation of a specific constitutional right, the petitioner need not show that the trial was rendered fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); United States v. Cotnam, 88 F.3d 487, 497-498 (7th Cir.) (noting the distinction between prosecutorial comments which implicate specific constitutional rights and those comments which are alleged to violate due process by denying the defendant a fair trial), cert. denied, 117 S.Ct. 326 (1996); Mahorney v. Wallman, 917 F.2d 469, 472 (10th Cir. 1990) (same).

The prosecutor's comment clearly implicated rights secured by the fourth amendment.[12] It is well recognized that "compelled intrusions into the body for blood" are deemed a fourth amendment search. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (citations omitted). Although blood samples may be withdrawn without a warrant if exigent circumstances exist, see Schmerber v. California, 384 U.S. 757, 770-771 (1966) (noting that such circumstances existed where blood had been withdrawn on the suspicion that the defendant had been drinking), the general rule is that a search warrant is required to take blood samples. See Barlow v. Ground, 943 F.2d 1132, 1139 (9th Cir. 1991), cert. denied, 505 U.S. 1206 (1992); In re Grand Jury Proceeding (T.S.), 816 F. Supp. 1196, 1205 (W. D. Ky. 1993) (concluding that the government must obtain a warrant to obtain blood samples). Accordingly, it was petitioner's right, secured by the fourth amendment, to compel the state to obtain a search warrant before providing the blood samples.

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[12] Petitioner's argument that the comment also implicates fifth and sixth amendment rights is without merit. The comment simply cannot be interpreted to suggest that the prosecutor was attempting to imply guilt from the petitioner's exercise of his rights to remain silent, to have counsel, or to a jury trial. Petitioner also urges the Court to find that the comment eviscerated the presumption of innocence. However, a fair reading of the prosecutor's comment does not support the conclusion that the presumption of innocence was negated by the prosecutor's reference to the search warrant that was secured to take blood samples.

It is well-established that a prosecutor may not ask the jury to draw negative inferences from a defendant's exercise of his constitutional rights. See, e.g., Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that use, for impeachment purposes, of a defendant's silence after his arrest and receipt of Miranda warnings violates the Due Process Clause of the fourteenth amendment); Gravley v. Mills, 87 F.3d 779, 788-789 (6th Cir. 1996) (same); Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the fifth amendment forbids a prosecutor to comment on an accused's silence); Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) (noting that the prosecutor's comments improperly implied that the defendant had abused the legal system by exercising his sixth amendment right to a jury trial); Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990) (holding that a prosecutor's comments that the defendant's consultation with his attorneys implies guilt strikes at the core of a defendant's right to counsel). The prohibition against these types of remarks has also been recognized where the defendant has exercised his fourth amendment right to be free from a warrantless search. See United States v. Rapanos, 895 F. Supp. 165, 169 (E.D. Mich. 1995) (Zatkoff, J.) (finding error where the prosecutor questioned the defendant on his refusal to allow the Department of Natural Resources onto his property without a search warrant); see also, United States v. Thame, 846 F.2d 200, 206-207 (3rd Cir.) (holding that the prosecutor erred by referring to the defendant's failure to consent to a search of his bag as evidence of guilt), cert. denied, 488 U.S. 928 (1988). These courts saw little, if any, distinction between comments regarding the exercise of fourth, fifth, or sixth amendment rights. Rapanos, 895 F. Supp. at 168 (citing Thame, 846 F.2d at 206). Moreover, in each of those cases, the prosecutor was using the defendant's exercise of his right

not to be subject to a warrantless search as evidence of the defendant's guilt.

That is exactly what happened in this case. The prosecutor attempted to use petitioner's unwillingness to consent to giving a blood sample without a warrant as evidence of his guilt. By doing so, the prosecutor impermissibly infringed upon petitioner's exercise of his fourth amendment rights.

IV.

Although it was error for the court to allow the state to introduce evidence of the probability of paternity and for the prosecutor to draw a negative inference from petitioner's exercise of his fourth amendment right, the analysis does not end there. The court must next look at whether the errors were harmless. In doing so, it must first be determined whether the errors are structural or trial-type. "Structural error is an error affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Structural errors include the denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), the right to an impartial judge, Tumey v. Ohio, 273 U.S. 510 (1927), and the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168 (1984). Such errors are simply not subject to harmless-error analysis because they infect the entire trial process. Fulminante, 499 U.S. at 309-310; California v. Roy, 117 S.Ct. 337, 338 (1996). Structural errors are the type of error which "affects the entire trial from beginning to end." Sherman v. Smith, 89 F.3d 1134, 1138 (4th Cir. 1996).

Trial type errors, on the other hand, are errors "which occurred during the presentation of the case to the jury." Fulminante, 499 U.S. at 307-308. They are confined to discrete moments in the course of an otherwise fair trial. Sherman, 89 F.3d at 1138. Because such errors may "be qualitatively assessed in the context of other evidence," they are subject to harmless-error analysis. Fulminante, 499 U.S. at 307-08. Trial-type errors include Doyle errors, Brecht v. Abrahamson, 507 U.S. 619, 629 (1993), restricting a defendant's right to cross-examine witnesses, Delaware v. Van Arsdall, 475 U.S. 673 (1986), admitting the out-of-court statement of a non-testifying co-defendant, Brown v. United States, 411 U.S. 223 (1973), and referring to a defendant's failure to testify at trial, Chapman v. California, 386 U.S. 18 (1967). See also Fulminante, 499 U.S. at 306-307 (discussing various errors to which the Supreme Court has applied harmless-error analysis).

Petitioner claims that the introduction of the probability of paternity statistic is a structural error because it undermined the presumption of innocence, the basic cornerstone of our criminal justice system. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). However, I find that both errors in this case are clearly trial-type errors. They are not the type of error which infected the entire trial process. Rather, they are subject to harmless-error analysis because they occurred during the presentation of the case and may be qualitatively assessed in the context of the other evidence to determine the effect it had on the trial.

When applying harmless-error analysis on direct review, a federal court must "be able to declare a belief that [the error] was harmless beyond a reasonable doubt."

Chapman, 386 U.S. at 24. However, on habeas review, a less onerous standard is applied. The inquiry is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" Brecht, 507 U.S. at 637 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Moreover, "when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." O'Neal v. McAninch, 115 S.Ct. 992, 999 (1995) .[13]

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[13] Although the Court in Brecht stated that the burden of proof was on the petitioner to prove that the error resulted in actual prejudice, Brecht, 507 U.S. at 638, the Supreme Court essentially rejected a burden of proof analysis in O'Neal. There, the Court concluded that where a habeas court has grave doubt about the harmlessness of an error, that doubt should be resolved in favor of petitioner, rather than the State. O'Neal, 115 S.Ct. at 996. The Court also noted that instead of applying the Kotteakos standard in terms of proof burdens, a habeas judge should ask directly whether the error substantially influenced the jury' s decision. Id. at 995. Other courts which have interpreted O'Neal have concluded that a burden of proof analysis is inapplicable under the Kotteakos standard. See Lyons v. Johnson, 99 F.3d 499, 502 n.5 (2nd Cir. 1996) (noting that, although Brecht implied that the petitioner had the burden, the Supreme Court's decision in O'Neal indicates that the writ should issue if the question of prejudice is in equipoise); Cooper v. Taylor, 70 F.3d 1454, 1462-1463 (4th Cir. 1995) (concluding that, in O'Neal, the Supreme Court effectively eschewed a burden of proof analysis by permitting a habeas court to issue the writ where the "matter is so evenly balanced that [it] feels [itself] in virtual equipoise as to the harmlessness of the error"), vacated, 103 F.3d 366 (4th Cir. 1996).

Petitioner, contends, however, that the Chapman standard should apply because the Michigan courts did not analyze the errors under Chapman while the case was on direct appeal. The Eighth Circuit and a number of district courts have concluded that where the state court has not applied the Chapman standard, the habeas court should apply harmless error analysis using the Chapman standard rather than the Kotteakos standard. See Williams v. Clarke, 40 F.3d 1529, 1540-1541 (8th Cir. 1994), cert. denied, 115 S.Ct. 1397 (1995); Starr v. Lockhart, 23 F.3d 1280, 1291-1292 (8th Cir.), cert. denied, 115 S.Ct. 499 (1994); Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993), cert. denied, 511 U.S. 1060 (1994); Lyons v. Johnson, 912 F. Supp. 679, 688 (S.D.N.Y.), aff'd, 99 F.3d 499 (2nd Cir. 1996); Rickman v. Dutton, 864 F. Supp. 686, 712 (M.D. Tenn. 1994). The rationale for the Eighth Circuit's approach is that Brecht was based on the premise that because state courts may properly apply the Chapman standard on direct review, comity and federalism would suggest that a habeas court defer to that state court's harmless-error analysis and only review the decision under the Kotteakos standard. Orndorff, 998 F.2d at 1430. However, such deference is not required where the state has failed to apply the harmless-error analysis at all. Lyons, 912 F. Supp. at 689.

Other circuits which have addressed this precise issue have reached the opposite conclusion. See Sherman v. Smith, 89 F.3d at 1141; Castro v. Oklahoma, 71 F.3d 1502, 1516 n.14 (10th Cir. 1995); Tyson v. Trigg, 50 F.3d 436, 447 (7th Cir. 1995) (concluding that the Chapman standard is inapplicable even if the state court failed to conduct harmless error analysis), cert. denied, 116 S.Ct. 697 (1996); Horsley v. Alabama, 45 F.3d 1486, 1492 n. 11 (11th Cir.), cert.

denied, 116 S.Ct. 410 (1995); Smith v. Dixon, 14 F.3d 956, 980 (4th Cir.), cert. denied, 513 U.S. 841 (1994). These courts emphasize the state's interest in the finality of convictions and the nature and purpose of collateral review. Sherman, 89 F.3d at 1141. They also note that Brecht contains no limitation as that announced by the Eighth Circuit and that such a limitation would rob Brecht of any significance. Id. (citing Tyson, 50 F.3d at 446).

I find the reasoning of the Eighth Circuit unpersuasive. Certainly, the procedural history of this case differs from that in Brecht in that the Michigan courts did not apply Chapman. However, a fair reading of Brech does not support the Eighth Circuit"s position that a federal habeas court may apply Chapman where the state court has failed to do so. As noted by the Sherman and Tyson courts, the Supreme Court drew no distinction between those cases where the state court had applied Chapman and those cases where the state court failed to engage in harmless-error analysis. Moreover, the Brecht court emphasized the distinction between direct and collateral review and the state's interest in the finality of convictions. The Eighth Circuit's reasoning simply does not account for these considerations. Accordingly, I find that Kotteakos, not Chapman, provides the appropriate harmless-error standard in this case.

Applying Kotteakos, I find that both the introduction of the statistical evidence relating to probability of paternity and the prosecutor's reference to petitioner's exercise of his fourth amendment rights had a substantial and injurious influence on the jury's verdict. Although errors in the admission of evidence are not ordinarily a proper basis for granting habeas relief, if the admission of the evidence

rendered the trial so fundamentally unfair as to violate due process, habeas relief may be granted. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); Matlock v. Rose, 731 F.2d 1236, 1242 (6th Cir. 1984). Here, the introduction of the statistical evidence which was predicated upon the assumption that there was a fifty percent chance that petitioner had intercourse with the victim meets that standard. As noted, the introduction and use of this evidence undermined the presumption of innocence and relieved the prosecutor of its burden to prove each element of the crime beyond a reasonable doubt. In view of the absence of any other evidence to prove that petitioner had sexual intercourse with the victim, there is no question that the error had a substantial and injurious effect in determining the jury's verdict.[14] Indeed, this is not a case in which the O'Neal "grave doubt" standard is even applicable. The error cannot be deemed harmless under any of the standards discussed above.

The issue of the prosecutor's comment on petitioner's exercise of his fourth amendment rights presents a far closer question in terms of harmless error.[15] Certainly, there are

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[14] Indeed, in all of the cases discussed in Part II of this report, the HLA tests and the evidence concerning the probability of paternity was utilized to corroborate the testimony of the complainant that she had sexual intercourse with the petitioner. Here, there is nothing to corroborate. The only evidence of intercourse between the victim and the petitioner was the HLA test results.

[15] The Sixth Circuit has set forth several factors which a habeas court should consider when evaluating prosecutorial misconduct. They include: 1) the degree to which the remarks

factors that would seem to indicate that the error did not have a substantial effect on the jury's verdict. The comment itself was clearly an isolated one. Moreover, the trial judge sustained defense counsel's objection and gave a curative instruction.

However, other considerations lead to my conclusion that the remark, although isolated, had a substantial influence on the jury's verdict. First, as explained above, the comment was a blatant attempt to imply guilt from the petitioner's election of blood sample. Moreover, the improper comment came during the cross-examination of petitioner, a pivotal part of the trial. See Rapanos, 895 F. Supp. at 168 (noting that the prosecutor's improper comments occurred during the defendant's cross examination, which is a "critical portion of the trial"). Furthermore, the prosecutor deliberately placed the comment before the jury on the belief that it was permissible.

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may mislead the jury and prejudice the accused; 2) whether the comments are extensive or isolated; 3) whether the comments were deliberately or accidentally placed before the jury; and 4) the strength of the competent proof to establish the guilt of the accused. Angel v. Overberg, 682 F.2d 605, 608 (6th Cir. 1982) (citing United States v. Leon, 534 F.2d 667, 679 (6th Cir. 1976)). The Supreme Court has also stated that the court should look to the remarks in the entire context of the trial and to presume that the jury would follow a curative instruction to ignore inadmissable evidence. Greer v. Miller, 483 U.S. 756, 766 and n.8 (1987). Although these factors are generally considered in the context of whether the trial was rendered fundamentally unfair, I find that they are also relevant in determining whether the prosecutor's comment in this case substantially influenced the jury's verdict.

Despite the fact that a curative instruction was given, I find that the instruction was deficient in several respects and did not effectively cure the error. First, it was given some time after the question was asked, following a 20-minute recess and after the prosecutor was permitted to complete his cross-examination. As petitioner notes, this was "long after the impermissible inference was implanted in the minds of the jurors." Moreover, the instruction was vague and did not clearly state to what evidence it referred. It cannot be said that this instruction was either sufficiently clear or timely so as to cure the error.

The final factor weighing in favor of finding that the error was not harmless is the weight of the evidence offered at trial to establish petitioner's guilt. The state's case relied almost exclusively upon the HLA testing results, the probability of paternity, and petitioner's access to the victim. Even assuming that the statistical evidence of the probability of paternity was admissible, given the absence of any other evidence which would corroborate petitioner's guilt, it cannot be said the prosecutor's comment was harmless. Like O'Neal, this is one of those cases where "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error." O'Neal, 115 S.Ct. at 995 (citation omitted). Because such doubt must be resolved in favor of the petitioner, the request for habeas relief on this issue should also be granted.[16]

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[16] Because of the conclusion reached here, I need not address petitioner's argument that the cumulative effect of the trial errors resulted in actual prejudice.

V.

For the reasons stated above, I find that the introduction of the statistical evidence quantifying the probability of paternity violated petitioner's constitutional rights and resulted in a fundamentally unfair trial. I further find that the prosecutor's comment on petitioner's exercise of his Fourth Amendment right not to have his blood drawn without a warrant was error of constitutional magnitude which had a substantial and injurious influence of the jury's verdict. Accordingly, I respectfully recommend that the court **GRANT** the petition for writ of habeas corpus.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §636(b)(1), the parties are hereby notified that within ten days after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

/s/_____
MARC L. GOLDMAN
UNITED STATES MAGISTRATE JUDGE

Date: MAY 14, 1997

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed November 19, 1999]

No. 97-1894

Theodore J. Lyons, *Petitioner-Appellee*,	)
v.	)
Clarice Stovall, *Respondent-Appellant.*	)

ORDER

BEFORE: MOORE, CLAY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/_____

Leonard Green, Clerk

APPENDIX E

STATE OF MICHIGAN
COURT OF APPEALS

[Filed April 15, 1994]

No. 147006

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

THEODORE JOSEPH LYONS,
Defendant-Appellant.

Before: Jansen, P.J., and White and Hansen*, JJ.

PER CURIAM.

Defendant appeals as of right, following his jury conviction in the Detroit Recorder's Court of first-degree criminal sexual conduct, MCL 750.520b(1)(h)(ii); MSA 28.788(2)(1)(h)(ii). He was subsequently sentenced to ten to twenty-five years' imprisonment. He initially appealed to this

* Circuit judge sitting on the Court of Appeals by assignment.

Court on May 11, 1990, in No. 128958. This Court dismissed defendant's appeal for lack of jurisdiction and denied defendant's motion for rehearing. Our Supreme Court, however, reversed those two orders and remanded to this Court as an appeal of right. 439 Mich 887 (1991). We affirm.

This case arises out of the rape of a profoundly mentally retarded woman in a group home. The victim was non-communicative, semi-ambulatory, and had an IQ of ten. She was discovered to be pregnant in December 1983 and it was determined that the date of conception was between June 4, 1983, and August 31, 1983. She gave birth to a baby boy on March 24, 1984. She died seven months after giving birth and before trial. Thus defendant could not be positively identified as the perpetrator in this case.

Defendant first argues that the search warrant which authorized a seizure of a sample of his blood was not supported by probable cause. A search warrant and the underlying affidavit are to be read in a common sense and realistic manner. This Court reviews the magistrate's decision to ensure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that evidence or contraband of a crime will be found in a particular place. People v. Russo, 439 Mich 584, 604; 487 NW2d (1992).

The search warrant authorized the police to collect two 10 cc vials of blood from defendant. The affidavit specifically requested the blood samples for paternity testing. After thoroughly reviewing the affidavit, we conclude that there was a substantial basis for the magistrate's conclusion that there

was a fair probability that evidence of the crime would be revealed through an analysis of defendant's blood. According to the affidavit, only six male employees (including defendant) at the facility where the victim lived had access to her. Defendant was the only remaining employee who had access to the victim who had not been excluded as the father of the child through blood tests or polygraph examinations. As defendant clearly had access to the victim and the other males had been excluded as the fathers, there was a fair probability that evidence of the crime would be revealed through an analysis of defendant's blood. Accordingly, the search warrant was supported by probably cause. Russo, supra, pp 606-607.

Defendant next claims that the trial court erred in denying his motion for directed verdict because there was insufficient evidence at trial to convict him of first-degree criminal sexual conduct. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. People v. Wolfe, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant was charged under MCL 750.520b(1)(h)(ii); MSA 28.788(2)(1)(h)(ii). Under that section, first-degree criminal sexual conduct exists when there is sexual penetration, the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and the perpetrator is in a position of authority over the victim and used his authority to coerce the victim to submit. Here, it is

undisputed that the victim became pregnant and thus there must have been a sexual penetration. Further, there is no question that the victim was mentally incapacitated as it was determined that she had an IQ of ten, she was non-communicative, she was semi-ambulatory and could not take care of herself, and her estimated social age was a little over two years. Further, defendant was in a position of authority over the victim because he was an employee at the group home and could have used his position of authority to coerce the victim to submit. The question in this case is whether this defendant was the perpetrator.

Taken in a light most favorable to the prosecution, we find that the evidence of the HLA tests and the probability of paternity together with the evidence regarding access was sufficient to prove that defendant was the perpetrator. The doctors who examined the victim concluded that she became pregnant in late June or July. Thus, at the time the victim became pregnant, she had already moved to the facility at which defendant worked and at which access to the victim was limited. Drs. Walker and Gershowitz did HLA tests to determine the probability of paternity. Dr. Walker testified that the odds were 429 to 1 that a man with defendant's blood type could be the father of the child, considering the child's blood type. In other words, Dr. Walker testified that the probability of paternity in this case was 99.76% in considering the mother's blood type as well. Dr. Gershowitz testified that the odds were 304 to 1 under his test that a man with defendant's blood type was the father of the child considering the child's blood type. The probability that defendant was the father of the child compared to any other man was 99.7%. However, Dr. Gershowitz admitted that under his test, 3.9% of men falsely accused would not be

excluded from his test. He later testified that subsequent to his initial report, an additional test was done which raised the probability of excluding a falsely accused man from 96.1% to 99.5%.

Additionally, defendant testified in his own behalf and denied that he was the perpetrator. The jury was thus able to weigh defendant's credibility and it was within the jury's purview to accept or reject the paternity tests based on the testimony. In considering the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for the jury to determine that defendant was the perpetrator of the offense.

Defendant next argues that the evidence of the statistical probability of his paternity of the child was improperly admitted. This Court, however, has recently held that such evidence is properly admissible. People v. Adams, 195 Mich App 267, 278-280; 489 NW2d (1992), modified on other grounds 441 Mich 915 (1993). Accordingly, the trial court did not abuse its discretion in admitting this evidence. Id. at 280.

Next, defendant argues that certain remarks made by the prosecutor at trial denied him due process and a fair trial. Because defendant failed to object to the remarks at trial, appellate review is precluded unless any prejudicial effect could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. People v. Crawford, 187 Mich Ap 344, 354; 467 NW2d 818 (1991).

We have thoroughly reviewed the prosecutor's remarks in context and do not find any error. There is thus no miscarriage of justice in declining to review this issue.

Defendant next claims that he was denied due process and a fair trial where the prosecutor improperly suggested on cross-examination that defendant's refusal to voluntarily allow for a sample of his blood to be taken indicated that he was guilty. The following colloquy occurred on cross-examination of defendant:

> A. [BY DEFENDANT] I'm innocent of this charge, yes.
>
> Q. [BY THE PROSECUTOR] That's all we're talking about. We're not talking about other things you may have done, just this particular crime we have charged against you.
>
> A. I'm not guilty of the charge. I had nothing to do with it.
>
> Q. I understand your defense perfectly, sir, but if you're the innocent man that you claim to be, why did the police have to get a search warrant and Court order to get your blood?

Defense counsel immediately objected and argument was held before the court out of the presence of the jury. The trial court sustained the objection and instructed the jury to strike the comment from its consideration.

Although we do not approve of or condone the prosecutor's remark, we find that the remark was properly cured by an instruction from the trial court that the jury was to strike the remark from its consideration. Further, the remark was an isolated one in a trial which took three days and seventeen witnesses were produced. Under these circumstances, we do not find that defendant was denied a fair and impartial trial due to the prosecutor's remark during cross-examination.

Defendant next claims that the order of deliberation instruction was improper and that the trial court erred in allowing the jury to take a tape recording of the instructions into the jury room during deliberations. Defendant did not object to the order of deliberation instruction. Therefore, we will review the instructions only for manifest injustice. People v. Van Dorsten, 441 Mich 540, 545; 494 NW2d 737 (1993). A review of the order of deliberation instruction indicates that it comports with the dictates of People v. Handley, 415 Mich 356, 361; 329 NW2d 710 (1982). Accordingly, there is no manifest injustice.

Regarding the taking of the tape recorded instructions into the jury room, defendant and the prosecutor agreed to this at trial. A trial court may properly provide the jury with a full set of eletronically recorded instructions for deliberation while in the jury room. MCR 6.414(G). There is thus no error with regard to this claim.

Finally, defendant claims that he was denied the effective assistance of counsel. Defendant properly preserved this issue because an evidentiary hearing was held. To establish a claim of ineffective assistance of counsel,

defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the defendant People v. Tommolino, 187 Mich App. 14, 17; 466 NW2d 315 (1991).

In his statement of issues presented, defendant argues that he was denied the effective assistance of counsel where counsel failed to advise him to accept a plea bargain offered by the prosecutor. Defendant, however, fails to argue this position in his brief. We therefore consider the issue to be abandoned on appeal. People v. Canter, 197 Mich App 550, 565; 496 NW2d 336 (1992).

Defendant also claims that he was denied the effective assistance of counsel where trial counsel failed to move for the mistrial after the prosecutor's remark concerning defendant not voluntarily giving a blood sample. We do not find that defendant was denied the effective assistance of counsel in this regard because trial counsel immediately objected to the remark and requested a curative instruction which was given by the trial court. This trial counsel properly responded to the prosecutor's remark. In light of our earlier holding that the remark does not require reversal, we do not find that the failure to move for a mistrial constituted a serious error or was deficient trial strategy. People v. Heard, 178 Mich App 692, 703; 444 NW2d 542 (1989).

Affirmed.

/s/ Kathleen Jansen
/s/ Helene N. White
/s/ Kurt N. Hansen